

INDEPENDENT REVIEW PANEL
TO STUDY THE
JUDGE ADVOCATE REQUIREMENTS
OF THE
DEPARTMENT OF THE NAVY

FINAL REPORT

FEBRUARY 22, 2011

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Preface

The Secretary of Defense appointed this Independent Panel (the Panel) in accordance with Section 506 of the Fiscal Year 2010 National Defense Authorization Act to review the judge advocate requirements of the Department of the Navy. Congress mandated the Panel to “carry out a study of the policies and management and organizational practices of the Navy and the Marine Corps with respect to the responsibilities, assignment, and career development of judge advocates for purposes of determining the number of judge advocates required to fulfill the legal mission of the Department of the Navy.” Specifically, Congress directed the Panel to review:

- emergent operational law requirements of the U.S. Navy and Marine Corps;
- new requirements to support the Office of Military Commissions;
- new requirements to support the disability evaluation system;
- requirements of the Department of the Navy for the military justice mission;
- whether additional authority for the Judge Advocate General over manpower policies and assignments of judge advocates in the U.S. Navy and Marine Corps is warranted;
- directives issued by the U.S. Navy and Marine Corps pertaining to shared missions requiring legal support;
- career patterns for Marine judge advocates to identify and validate assignments to non-legal billets; and
- other matters as appropriate for the purposes of the study.

The Panel complied with the Federal Advisory Committee Act (FACA), conducting five public meetings and archiving more than 200 documents. The Panel initiated its review by receiving a full day of testimony from Vice Admiral (VADM) James W. Houck, JAGC, USN, Judge Advocate General of the Department of the Navy, and Major General Vaughn A. Ary, USMC, Staff Judge Advocate to the Commandant of the Marine Corps (SJA to CMC) on the policies, management, and organizational practices of the U.S. Navy and the Marine Corps with

respect to judge advocates within the Department of the Navy. Subsequently, the Panel received testimony and information from several witnesses, including:

- VADM Bruce E. MacDonald, JAGC, USN (Ret.), Convening Authority for Military Commissions, testified about the present and future personnel requirements for the Office of Military Commissions;
- Dr. Neil B. Carey and Dr. Donald A. Birchler, Research Analysts from the Center for Naval Analyses (CNA), testified and provided information about the two-part CNA study titled *An Analysis of Navy JAG Corps Future Manpower Requirements (CNA Study)* on U.S. Navy judge advocate manning;
- Captain (CAPT) Daniel E. O’Toole, JAGC, USN, Chief Judge of the Department of the Navy; Colonel (Col) Peter B. Collins, USMC, Assistant Judge Advocate General (Military Justice); and CAPT Michael J. Boock, JAGC, USN, Commanding Officer, Naval Justice School, testified about the execution of the military justice mission in the Department of the Navy;
- General (GEN) David H. Petraeus, USA, Commander, NATO International Security Assistance Force, and Commander, U.S Forces Afghanistan; VADM Harry B. Harris, Jr., USN, Commander, U.S. Sixth Fleet; VADM John M. Bird, USN, Director, Navy Staff; VADM Robert S. Harward, USN, Commander, Joint Interagency Task Force 435, Afghanistan; Lieutenant General (LtGen) John F. Kelly, USMC, Commander, Marine Forces Reserve and Commander, Marine Forces North; and LtGen Richard F. Natonski, USMC (Ret.), former Commander for U.S. Marine Corps Forces Command, testified from their perspectives as senior line commanders, on emergent operational law requirements;
- CAPT Stacy A. Pedrozo, JAGC, USN, U.S. Navy Military Fellow, Council on Foreign Relations; Col John R. Ewers, USMC, Deputy SJA to CMC; and Colonel Kevan F. Jacobson, JAGC, USA, Director, Legal Center, The Judge Advocate General’s Legal Center and School, testified from their perspectives as senior judge advocates, on emergent operational law requirements;

- Senior Executive Service (SES) Michael F. Applegate, Director, Manpower Plans and Policies Division, Manpower and Reserve Affairs, Headquarters, Marine Corps; and Col John R. Ewers, USMC, Deputy SJA to CMC, testified and provided information regarding Marine Corps career patterns, professional development, and promotion; and
- Mr. Robert C. Powers, President, Department of the Navy/Marine Corps Physical Evaluation Board; CAPT Michael I. Quinn, JAGC, USN, Assistant Judge Advocate General (Civil Law); and Lieutenant Colonel Peter C. Faerber, USMC, U.S. Marine Corps Wounded Warrior Counsel, testified and provided information regarding new requirements for the disability evaluation system.

The Panel sincerely thanks everyone who testified or provided information. Without exception, individuals and organizations, in particular, the Department of the Navy legal communities, including the Judge Advocate General of the Navy, the Staff Judge Advocate to the Commandant of the Marine Corps, and the General Counsel of the Navy, were exceptionally responsive to the Panel's requests for information.

The Panel thanks the Office of the Secretary of the Navy for providing administrative support. The personnel assigned to the Department of the Navy, Assistant for Administration were extremely cooperative, supportive, and professional in responding to the Panel's administrative and logistics requirements. In addition, the administrative personnel in the Office of the General Counsel of the Navy provided superb cooperation and assistance in logistical matters, and fund execution and management necessary to the Panel.

Finally, the Panel recognizes and thanks its Staff. Mr. Michael McGregor, CAPT Patrick Neher, JAGC, USN, Major Edward Danielson, USMC, Lieutenant Commander Raghav Kotval, JAGC, USNR, Major Suzan Thompson, USMC, and Lieutenant Lisa M. Senay, JAGC, USN, proved to be exceptionally capable, dedicated and hardworking professionals, and their contributions to the researching and drafting of this report were outstanding. Mr. Michael McGregor from the Office of the General Counsel (OGC) also provided superb guidance as the Staff Director. Ms. Gloria Williams, Executive Assistant, and Mr. Michael Gibson, Secretary, provided exceptional administrative support. Mr. Frank Putzu from OGC did an excellent job as the Designated Federal Officer in ensuring FACA compliance.

Executive Summary

Overview

The testimony provided to the Panel from senior military commanders, notably including General Petraeus, USA, Vice Admiral Harris, USN, Vice Admiral Bird, USN, Lieutenant General Kelly, USMC, Lieutenant General Natonski, USMC (Ret.) and Vice Admiral Harward, USN, uniformly and forcefully underscored the broad and valuable contribution of judge advocates to mission success of U.S. Armed Forces. Although judge advocates comprise only two percent of the officers in the Navy and Marine Corps, it is clear that their contributions far exceed their numbers throughout all phases of military operations from training to post-conflict operations. The Panel believes the demand for judge advocate support will continue, unabated, driven by the increasing complexity and intensity of the legal and policy environment in which commanders are required to operate. In addition, their contribution to good order and discipline, by supporting a just and functional military justice system, is equally noteworthy and essential to the overall well being of the Navy and Marine Corps. Military justice, from complex, high-profile general courts-martial to due process advice and representation during administrative proceedings, needs to remain an important and necessary core function for Navy and Marine judge advocates. In the end, proper manning, resourcing, training, and retention of judge advocates in the Navy and Marine Corps is both a necessity and a cost-effective force multiplier that contributes to the ultimate mission success of both Services.

After careful review and consideration of the Navy and Marine Corps manpower systems, previous manpower studies, testimony by senior commanders and judge advocates, and the assessments of the Judge Advocate General of the Navy and the Staff Judge Advocate to the Commandant of the Marine Corps, the Panel concludes that there is a requirement in the U.S. Navy for approximately 950 active-duty judge advocates and a requirement in the Marine Corps for a target inventory of approximately 550 active-duty judge advocates. The Marine Corps is on track to maintain a target inventory of 550 over the next five years. The Navy is currently well below 950 judge advocates on active duty. At the end of Fiscal Year 2010, 811 judge advocates were on active duty, and the existing manpower plans for the next five years are to further reduce the number of Navy judge advocates on active duty. Accordingly, the Panel expresses strong

concern over the current and future manning levels for judge advocates in the Navy, believing those manning levels create an unacceptable legal risk to the Department of the Navy.

One of the Panel's most notable conclusions relating to Navy and Marine Corps judge advocate manpower requirements is that the demand for operational law support could approximately double over the next decade. This strong rise in demand is based upon the testimony of senior operational commanders and judge advocates, consideration of the security trends identified in national and military strategy documents, and consideration of actual increased demand for operational law support over the last decade. Judge advocates are playing an ever increasing role in the complex legal and policy environments that currently confront, and will continue to confront, operational commanders.

Also, the testimony and information considered by the Panel makes clear that ensuring appropriate judge advocate training, experience, supervision and oversight is as equally important as ensuring appropriate manning levels. This manifested itself in the Panel's review of community health programs, military justice oversight mechanisms, and proposals to clarify and strengthen the roles of senior community leadership. Assigning judge advocates with the appropriate training and experience for a billet and maintaining appropriate oversight are crucial factors in ensuring that sound and effective legal services are provided and maintained within the Department of the Navy. It is vital that Department and Service leaders continue to support Navy and Marine Corps judge advocate community health initiatives that allow for the recruiting, training, and retention of the right judge advocates.

The Panel heard from several witnesses on the issue of post-trial processing of general and special courts-martial and reviewed the Judge Advocate General's *Report on the State of Military Justice* and the Department of Defense Inspector General's report titled *Evaluation of Post-Trial Reviews of Courts-Martial Within the Department of the Navy*. The Panel is satisfied that the Department of the Navy has taken effective steps to correct deficiencies in the post-trial process. The Panel considers it noteworthy that in 2010 no case was granted appellate relief for a due process violation resulting from post-trial delay. In order to assure continued, focused oversight by leadership on military justice, the Panel urges the Department of the Navy to institutionalize the Military Justice Oversight Council and the requirement for an annual report

on the state of military justice, and to aggressively follow through on finding and adopting a single electronic tracking system for courts-martial across the Department. The Panel believes that all three of these actions are essential in precluding a future failure in the post-trial process.

The Panel reviewed the role of the Judge Advocate General of the Navy and the Staff Judge Advocate to the Commandant and concluded, consistent with positions of the Secretary of the Navy and the Department of Defense Inspector General, that the role of the SJA to CMC for supervision of the administration of military justice and the delivery of legal assistance services within the Marine Corps, and for the professional and technical supervision of Marine judge advocates, should be clarified and strengthened.

The Judge Advocate General and Staff Judge Advocate to the Commandant testified separately and together and it was evident that both have intimate knowledge of their judge advocate communities, the challenges they face, and clear visions of how to maintain and enhance those communities. It was also clear that both recognized the value of teaming with each other and the General Counsel. Both reported strong and supportive relationships with their Service Chiefs, manifested in consistent support for their communities. Both recognized that the future will likely present a period of declining resources within the Department of Defense, resulting in greater competition for those resources and necessitating efforts to find efficiencies. Moreover, this anticipated decline in resources will occur during a period of increasing demand for legal services, particularly in operational law, while needing to maintain core competencies such as military justice. The Panel hopes that this report will assist decision makers in making informed decisions on the best manpower solutions in the context of these resource challenges.

Following is a summary of Sections I through VI of the Report. Section VII provides a consolidated list of the Panel's conclusions and recommendations found in each of these Sections.

Section I. Department of the Navy Legal Communities Today

The Department of the Navy is comprised of three legal communities: the Office of the General Counsel, led by the General Counsel of the Navy, with 708 full-time civilian attorneys; the Navy Judge Advocate General's Corps, led by the Judge Advocate General of the Navy, with 811 active-duty judge advocates and 50 career civilian attorneys; and the Marine Corps Legal

Services community, with 435 active-duty Marine judge advocates and 13 career civilian attorneys, the senior judge advocate serving as the Staff Judge Advocate to the Commandant of the Marine Corps. Although the legal communities in the three Military Departments are structured differently, the Department of the Navy maintains the lowest attorney to end-strength ratio among the Military Departments. The full-time attorney to end-strength ratio for the Department of the Army is 1 to 177; for the Department of the Air Force 1 to 198; and for the Department of the Navy 1 to 263.

Section II. The Navy and Marine Corps Manpower Management Systems

The Navy and Marine Corps have well-developed manpower management systems, operating in the context of the Department of Defense Planning, Programming, Budgeting and Execution System.

In the Navy, Budget Submitting Offices (BSOs) drive the manpower requirements. The BSOs are generally aligned with Echelon II commands, and determine and validate the peacetime and wartime manning requirements, including the number of judge advocates, for themselves and their subordinate commands and staffs. While the Navy Judge Advocate General (JAG) is not a BSO, the JAG does enjoy influence within the BSO system as a “customer” within the Field Support Activity BSO and the Department of the Navy, Administrative Assistant BSO. Those two BSOs account for 62% of judge advocate manning requirements within the Navy.

The Navy JAG also exercises influence in manpower management by assigning a senior judge advocate who serves as the judge advocate community manager within the Bureau of Naval Personnel, and the JAG has the statutory authority to make all judge advocate assignments in the Navy. Nonetheless, the JAG has no direct, formal role or authority in the determination or validation of judge advocate manpower requirements in the Navy.

In the Marine Corps, judge advocate requirements are driven by the Marine Corps’ organizational force structure and the requirement to fill a proportionate share of non-legal assignments (“B-Billets”). Structure is determined by the Total Force Structure Division (TFSD) in concert with subject matter experts and functional advocates. TFSD evaluates each unit’s mission statement and essential tasks and determines the right skills by grade and quantity

needed to accomplish that particular unit's mission. The process results in Tables of Organization that represent the total personnel required, tabulated by military occupational specialty (MOS), such as judge advocate (MOS 4402), and by grade for each unit in the Marine Corps. These requirements are continuously reviewed through a top-down, bottom-up process to ensure structured requirements meet mission requirements.

Fiscal realities require the Marine Corps to periodically prioritize the force structure to determine what portion of each unit's structure will be authorized for funding. The results of this process are produced bi-annually in the Authorized Strength Report (ASR). The Deputy Commandant, Manpower and Reserve Affairs inputs the ASR into a computer modeling process to create a Grade Adjusted Recapitulation – a forecasted target inventory. This inventory accounts for the number of judge advocates required on active duty to fulfill funded, structured requirements on the ASR, plus a proportionate share of B-Billets, and a certain number of officers as overhead to sustain the force.

The SJA to CMC participates in the Marine Corps manpower system as the Occupational Field Manager and Functional Advocate for the Marine Corps Legal Services community. These roles provide the SJA to CMC a formal, integrated, and meaningful role in Marine judge advocate structure, inventory, recruiting, education, training, and assignments.

Section III. Determining the Number of Judge Advocates Required to Fulfill the Legal Mission of the Department of the Navy

A. No Single Standard

The Panel found no set formula or standard within the Department of Defense or the Department of the Navy for determining the number of judge advocates required within the Military Departments or Services. The Panel did review the numbers of judge advocates in the other Military Departments; however, the legal communities in each of the Military Departments are different, and such comparison can only be used as a benchmark in examining judge advocate manning levels in the Department of the Navy. These benchmarks show that the Department of the Navy has substantially the lowest attorney-to-end-strength ratio of all the Military Departments.

B. Review of Operational Law Requirements

Since September 11, 2001 there has been a substantial growth in operational law requirements. For U.S. Navy judge advocates, the number of permanent operational law assignments has risen from 130 to 223. This reflects, in part, the Navy's establishment of Maritime Operations Centers and Maritime Headquarters at Navy component commands and numbered fleets, which integrate judge advocates into watch staffs. In addition, 584 U.S. Navy judge advocates have served in Individual Augmentee assignments, mostly in Iraq and Afghanistan. For Marine judge advocates, the number of permanent operational law assignments has risen from 20 to 47. In addition, 499 Marine judge advocates have deployed with Marine Corps operational units in support of Operation Iraqi Freedom and Operation Enduring Freedom, and another 108 Marine judge advocates have deployed as Individual Augmentees. This reflects, in part, decisions by senior Marine Corps battlefield commanders to increase the number of judge advocates in the command elements of Marine Expeditionary Forces and assign judge advocates to regiments and maneuver battalions.

This increase in demand for operational law support was detected in 2007 by the Center for Naval Analyses study, *An Analysis of Navy JAG Corps Future Manpower Requirements (CNA Study)*, which concluded that operational law requirements would increase at a minimum rate of 5.9% per year into the near future, doubling over 12 years. Continued growth is portended in the *Quadrennial Defense Review (QDR)*, which describes a landscape filled with increasingly complex legal and policy issues beyond Iraq and Afghanistan. The *QDR* identifies four enduring trends: the rise of new powers; the growth of non-state actors; lowered barriers for dangerous technologies, including missile technologies and weapons of mass destruction; and a competition for resources driven by demographic, climate change, and disease. These trends will contribute to an operational landscape where U.S. forces will have to deal with increasingly multi-dimensional or hybrid threats, threats to global commons including the cyber domain, growing anti-access/area denial capabilities, and weak or failed States that are not able, or are unwilling, to maintain the rule of law.

The Panel concludes that the number of permanent operational law billets in the Department of the Navy can be expected to approximately double over the next decade in

response to the increasing legal intensity and complexity of the modern operating environment. These billets will require forward-deployed judge advocates, integrated in the commander's staff, with the requisite levels of education, training, and experience to provide real-time advice to operational commanders. In regard to education, the Panel specifically believes that the Navy needs to develop and fund a requirement for its judge advocates to receive Joint Professional Military Education (JPME). Due to their status as unrestricted line officers, Marine judge advocates are already required to complete JPME as part of their general PME requirement.

C. Review of Requirements to Support Military Commissions

The Deputy Secretary of Defense requires the Department of the Navy to provide 30 U.S. Navy judge advocates and 13 Marine judge advocates to the Office of Military Commissions (OMC). Currently, 28 U.S. Navy judge advocates and 13 Marine judge advocates are assigned to the OMC. The Deputy Secretary of Defense manning requirement expires in December 2012 and, unless extended, Navy and Marine judge advocate end-strength will be reduced accordingly. In January 2010, pursuant to an executive order, the Attorney General of the United States published the *Final Report: Guantanamo Review Task Force*, which recommended 36 detainees for prosecution in either Federal Court or Military Commission. Two of those detainees have subsequently pled guilty, leaving 34 detainees recommended for prosecution. At this point, it is unclear how the Government will proceed in these cases. If a majority of these cases are prosecuted by military commissions, it is likely that the OMC will request judge advocates with greater levels of litigation experience. Such a request will require the JAG and the SJA to CMC to carefully balance the need to assign these more experienced, and likely more senior, judge advocates to OMC while maintaining an appropriate level of experience and leadership to fulfill the continuing legal mission of the Navy and Marine Corps. The existence of the OMC and the prospect for future military commissions underscores the need to develop and retain experienced, expert trial litigators in the Navy and Marine judge advocate communities.

D. Review of Requirements to Support the Disability Evaluation System

Pursuant to the Wounded Warrior Act of 2008, the Department of the Navy, along with the other military departments, is transitioning to the Integrated Disability Evaluation System (IDES). IDES creates a new requirement that certified counsel be provided to wounded, ill, or

injured service members upon receipt of results from an informal physical evaluation board (IPEB). This is in addition to the requirement for counsel at the formal physical evaluation board (FPEB). The Department of the Navy initially met this requirement through the activation of ten reserve U.S. Navy judge advocates. In addition, the Marine Corps activated four reserve Marine judge advocates, two at Camp Lejeune and two at Camp Pendleton, to provide both pre-IPEB and post-IPEB legal services to service members. The Department plans to replace the ten U.S. Navy activated reservists serving as IPEB counsel with ten Navy-employed civilian attorneys. In the near term, the Marine Corps plans to activate an additional nine, for a total of thirteen, reserve judge advocates to provide both pre-IPEB and post-IPEB counseling, and allow for further study of the appropriate number of legal counsel needed to accomplish the mission in the long-term. The Department has also taken satisfactory steps to meet the IDES training and certification requirement for IPEB counsel by providing introductory training to all new accessions during the Basic Lawyer Course, and by requiring personnel serving as IPEB counsel to attend a week-long training course to obtain certification.

IDES has also set new permissible attorney caseloads and processing times in the FPEB process. Currently, two U.S. Navy judge advocates are assigned to represent Sailors and Marines who elect review by the FPEB. As with IPEB counsel, these positions will be transitioned to Navy-employed civilian attorney positions. However, the new caseload and processing time requirements will require a third FPEB counsel.

Finally, IDES now allows the Services to provide, at their discretion, counsel to service members prior to the IPEB decision. The Marine Corps and the Army are providing counsel prior to the IPEB decision; the Navy and the Air Force are not. The Panel recommends that this difference be examined by the Department of Defense and Department of the Navy for the purpose of considering the balance of interests in providing early representation, and the implications of having the Services provide different levels of legal support to wounded, ill, and injured service members.

E. Review of Requirements for Military Justice

Support of the military justice system remains a core statutory mission for both U.S. Navy and Marine judge advocates and is fundamental to maintaining good order and discipline and to protecting the individual due process rights of service members.

Overall the number of courts-martial has decreased significantly over the last decade, more so within the U.S. Navy than in the Marine Corps. However, the number of general courts-martial cases, which tend to be more serious and complex, has stabilized since approximately Fiscal Year 2006 (FY 06) and now represent a growing percentage of total courts-martial tried. In FY 00, the Navy tried 252 general courts-martial and 755 special courts-martial compared to 108 general courts-martial and 127 special courts-martial in FY 10. In FY 00, the Marine Corps tried 176 general courts-martial and 1,626 special courts-martial compared to 178 general courts-martial and 623 special courts-martial in FY 10. There is little empirical evidence on the cause of the decline or on future trends in military justice, although some opined that caseloads might increase if deployed forces returned to garrison. However, the numbers of alternative disciplinary and administrative actions against individual service members requiring some level of judge advocate support within the Navy and Marine Corps have not experienced similar declines. These actions include summary courts-martial, nonjudicial punishment, and administrative separation. In fact, within the Marine Corps, rates of reported misconduct have remained relatively level over the last 10 years, indicating that reduced numbers of special courts-martial in the Marine Corps are a result of alternative disposition decisions by Marine commanders.

The Navy and Marine Corps must maintain a cadre of trained and experienced litigators, supervisory counsel, and judges to effectively and efficiently meet the demands of the military justice system, including the prosecution and defense of complex and high profile cases. The ability to maintain this cadre of experienced counsel has been made more challenging due to the significant and disproportionate decline in the number of less complex and less serious special courts-martial, and due to increasing demands to deploy judge advocates to operational assignments.

The Navy and Marine judge advocate communities have taken steps to address these challenges. The Navy has established a Defense Counsel Assistance Program and a Trial Counsel Assistance Program to better support defense and trial counsel practice across the Naval Legal Service Command (NLSC). The Navy has replaced the neutral Vice Commander, NLSC with two separate Deputy Commanders – one for Region Legal Service Offices that advise commands and prosecute cases, and one for Naval Legal Services Offices that advise individuals and defend cases. The Deputy Commanders will enhance the oversight and independence of both functions. The Navy also has implemented a Military Justice Litigation Career Track to ensure that, in the face of declining caseload, experienced litigators will be in place to litigate courts-martial and serve in supervisory positions within the Navy’s military justice system and in the judiciary. Finally, the Navy is considering implementing a separate Trial Defense Command that would include a realignment of functions within the NLSC.

The Marine Corps also recently established a Trial Counsel Assistance Program to support Marine Corps prosecutors. The Marine Corps has had an independent Chief Defense Counsel of the Marine Corps organization for over 25 years to enhance the supervision and independence of Marine defense counsel. In 2005, the Marine Corps added a Military Occupational Specialty for judge advocates - Master of Criminal Law (MOS 4409). There are now 26 billets requiring this judge advocate specialty. The 4409 coded billets are supervisory (e.g., senior trial counsel, military justice officer, senior defense counsel, and regional defense counsel) and help ensure an effective cadre of military justice expertise and experience within the Marine Corps.

Post-trial processing performance was examined, particularly in the wake of the *United States v. Foster* decision by the Navy-Marine Corps Court of Criminal Appeals that identified serious post-trial process failures. Recent post-trial processing statistics demonstrate a clear and consistent improvement in performance. In 2010, no case was granted appellate relief for a due process violation resulting from post-trial delay.

Significant remedial measures were identified that will serve to preclude future failures in post-trial processing. These include the establishment of the following: (1) the Military Justice Oversight Council; (2) the position of Chief Judge, Department of the Navy; (3) an annual report

on the state of military justice in the Department of the Navy; (4) standards and inspections; (5) efforts to adopt a single courts-martial electronic tracking system; and (6) a pilot program to use electronic records of trial.

The Panel believes that the challenge presented to the leaders of the Navy and Marine judge advocate communities, with respect to their essential core military justice function, has as much to do with ensuring engaged leadership and effective oversight as it does with numbers of judge advocates. In this regard, the Panel believes that development and execution of a single courts-martial case tracking system and the codification in Department regulation of an annual report on the state of military justice and the Military Justice Oversight Council are imperative.

F. Review of Requirements for Community Health

During the Panel's study, it became evident that maintaining the quality of judge advocates, as well as the right number of judge advocates, is critical to successfully meet the legal support requirements for the Department of the Navy. The health of the Navy and Marine judge advocate communities is strong and rests on three pillars: recruiting, retention, and professional education and training. Key factors in preserving the strength of the communities include: continued, active interest and engagement by Navy and Marine judge advocate leadership in the recruiting process; continued support by the Department and the Services for the Navy's Judge Advocate Continuation Pay program and the Marine Corps' Law School Education Debt Subsidy program; and continued support by the Department and the Services for post-graduate education. The Panel underlines the importance of post-graduate education for judge advocates in a world where the ability to conduct military training exercises and real world operations are increasingly subject to nuanced policy and legal issues. Finally, the Panel is concerned that the U.S. Navy does not view Joint Professional Military Education (JPME) as a requirement for Navy judge advocates and consequently does not fund JPME training. The Panel believes that JPME would further enhance the ability and skill sets of Navy judge advocates, and recommends that the Navy develop and fund a requirement for JPME for its judge advocates.

G. Review of Other Manpower Studies

The Panel considered several prior manpower studies during its review, in particular, the *CNA Study* focused on U.S. Navy judge advocate manning levels and a series of Marine Corps manpower reviews. The common conclusion of all of the studies is that the need for U.S. Navy and Marine judge advocates is increasing, particularly in relation to Joint operational billets. For example, the *CNA Study* predicted that the requirement for U.S. Navy judge advocates in operational law areas would grow, conservatively, at an annual rate of 5.9%. Likewise, 2005 and 2007 Marine Corps studies recommend a realignment and/or increase of Marine judge advocate force structure to reflect an increase in demand for legal support to Marine Corps operating forces and Joint commands. In general, these prior manpower studies are in alignment with the Panel's views on manpower requirements.

H. Manpower Recommendations by the JAG and the SJA to CMC

The Judge Advocate General's (JAG's) assessment was that there should be 926 judge advocates on active duty to meet current demands for U.S. Navy judge advocates, including existing individual augmentee (IA) assignments and Office of Military Commission (OMC) assignments. This would include a baseline of 821 judge advocates to meet standing legal missions within acceptable levels of legal risk, and an additional 105 judge advocates to meet and sustain current IA and OMC requirements. At the end of Fiscal Year 2010, there were only 811 judge advocates on active duty in the Navy. The JAG believed this manning level (811) presented risks to the Navy, to Joint forces, and to the Judge Advocate General's Corps itself.

The Staff Judge Advocate to the Commandant of the Marine Corps assessed that a judge advocate force structure of approximately 408, with a targeted inventory of more than 550 judge advocates in the Marine Corps, would meet structured requirements for Service, Department and Joint legal billets, as well as requirements for non-legal assignments (B-Billets) and sustainment overhead. This assessment did not include any judge advocates to sustain the OMC requirement. The SJA to CMC believes the Marine Corps' projected target inventories for the next five years are sufficient to meet these forecasted requirements.

I. Panel's Manpower Conclusions

The Panel concluded that the Department of the Navy requires approximately 950 active-duty U.S. Navy judge advocates and a target inventory of approximately 550 active-duty Marine Corps judge advocates to fulfill the legal missions of the Department.

The Panel found that recent bottom-up, top-down, requirement-driven manpower determinations conducted by the Marine Corps, along with reviews directed by the Staff Judge Advocate to the Commandant of the Marine Corps, were most informative and applauds the Marine Corps for its recent actions and decisions to increase the force structure and inventory of judge advocates. The Marine Corps increased its judge advocate force structure from 340 in FY 06 to 378 in FY 11 and plans to increase structure to over 400 by FY 15. This increase results in a target inventory of approximately 550 active-duty Marine judge advocates over the next five years, which the Panel believes will be satisfactory. The Panel notes several factors that could affect this manpower projection, including an increase in military justice following the return of Marines from Afghanistan, continued historic rates of growth in structured operational law requirements, requirements associated with recommended changes to the SJA to CMC's role in the supervision of the delivery of legal services within the Marine Corps, or a significant reduction in Marine Corps total officer and enlisted end-strength.

In contrast, the Panel expresses strong concern over the current and projected manning levels for U.S. Navy judge advocates. The Navy finished FY 10 with 811 active-duty judge advocates, and has programmed further reductions in judge advocate manning over the next five years. These end-strength projections are well below the JAG's assessment of current manpower needs. The JAG projected that the JAG Corps currently needs 926 judge advocates to fulfill the Navy's legal mission within acceptable parameters of legal risk. The Panel looked favorably upon the JAG's assessment, noting that the current JAG is well situated to provide an assessment, having served as a community leader for over four years, and that the assessment was based upon a comprehensive command-by-command analysis across the entire Navy to include support to Joint commands. However, the Panel believed that the assessment of 926 should be adjusted to a requirement of approximately 950 active-duty U.S. Navy judge advocates by 2015. The Panel foresees several areas, particularly in the operational law arena, where continued growth should be expected. In reaching its recommendation of approximately 950

judge advocates, the Panel was also informed by the *CNA Study*, that while imperfect in some regards, would project a requirement of 974 judge advocates using a 45-hour work week, and the benchmark ratios of full-time attorneys to active-duty end-strength in the Army and Air Force that would suggest a comparable manning level for the Navy of 1205 active-duty judges advocates, using the Army ratio, or 1,077 active-duty judge advocates, using the Air Force ratio.

The Panel concludes its manpower assessment with three points of emphasis: first, the Panel, based upon review of the 2010 *Quadrennial Defense Review* and the testimony received, firmly believes that operational law requirements are likely to continue to grow at a rapid pace; second, that there are “fixed costs” that must be met in operating a military justice system worthy of the men and women serving in uniform; and, finally, the Panel again expresses its strong concern over future active-duty judge advocate manning in the Navy.

Section IV. Review of Career Patterns for Marine Judge Advocates

Marine judge advocates, unlike their judge advocate counterparts within the Judge Advocates General’s Corps in the Army, Air Force, and Navy, are unrestricted line officers and undergo the same indoctrination and training as all other Marine Corps officers. Because of their status as line officers, Marine judge advocates compete for assignments and promotion with all other Marine Corps officers. The importance of this foundational paradigm was highlighted throughout the testimony of the senior Marine Corps operational commanders, as well as the senior members of the Marine Corps legal service community that testified before the Panel. Both groups articulated the firm belief that the service of Marine judge advocates as unrestricted line officers, serving in command, operational, and other non-legal billets, makes them better Marine Corps officers and legal advisors within the Marine Corps. Lieutenant General Natonski, USMC (Ret.), the former Commander of the 1st Marine Division, succinctly summarized the views when he stated, “having a lawyer that understands the culture . . . is critical in our [Marine Corps] culture and in the credibility of our judge advocates.” Marine Corps training, education and manpower requirements account for the service of Marine judge advocates in non-legal assignments; and Marine judge advocates have competed, and continue to compete favorably for promotions and command.

Section V. Review of Directives Pertaining to Jointly-Shared Missions

The Department of the Navy is unique among the Military Departments in that it oversees two Services, the Navy and the Marine Corps. A benefit of serving in the same Department is that the Navy and Marine Corps legal communities share a foundation of common directives. The first among these common directives is the *Manual of the Judge Advocate General (JAGMAN)*. The *JAGMAN* provides common practice and procedures across both judge advocate communities, significantly enhancing the ability of Navy and Marine judge advocates to serve together in support of Department and Service missions. In addition, other directives that guide the practice of Navy and Marine judge advocates in the areas of claims, legal assistance, professional conduct, judicial screening, the trial judiciary, and the court of criminal appeals exist. The ability to team is bolstered by the fact that all U.S. Navy and Marine judge advocates begin their judge advocate careers together in the Basic Lawyer Course at the Naval Justice School. The Panel found that appropriate common directives, guidance, and training exist, and that the Judge Advocate General and the Staff Judge Advocate to the Commandant of the Marine Corps are committed, along with the General Counsel of the Navy, to working together to meet the Department of the Navy's legal requirements.

Section VI. Review of the Role of the Judge Advocate General of the Navy and the SJA to CMC

A detailed review of the statutory and regulatory roles and responsibilities of the Judge Advocate General of the Navy (JAG) and the Staff Judge Advocate to the Commandant (SJA to CMC) revealed an intricate and complex relationship between the Navy and Marine Corps judge advocate communities in support of the Department of the Navy and their respective Services. The role of the JAG of the Navy differs from the roles of the JAGs in the Army and Air Force due to the dual-Service nature of the Department of the Navy. Unlike the Army JAG and the Air Force JAG that are by statute placed within their Service staffs and report directly to their Service Chiefs, the Navy JAG is by statute placed in the Office of the Secretary of the Navy and reports directly to the Secretary. The Navy JAG is part of the Office of the Chief of Naval Operations only by regulation, and is not part of Headquarters, Marine Corps. The SJA to CMC, similar to the Army and Air Force JAGs, is by statute part of the Service staff (Headquarters,

Marine Corps), reports directly to the Service Chief (the Commandant), and is not part of the Office of the Secretary of the Navy.

Specific review of the authorities of the JAG over manpower policies and assignments within the Navy suggest that, while the JAG has been assigned the responsibility as a capability sponsor to “build a coherent legal community,” by both the Secretary of the Navy and Chief of Naval Operations instructions, the JAG does not have any specific authorities within the Navy manpower management system commensurate with that responsibility. The Panel recommended that the Secretary of the Navy and the Chief of Naval Operations, in coordination with the JAG, identify the authorities necessary for the JAG to execute the assigned responsibility to build a coherent legal community. In regard to assignment of U.S. Navy judge advocates, the JAG has all necessary authority to make assignments in accordance with Article 6 of the Uniform Code of Military Justice. In regard to the Marine Corps, the JAG has some authorities over Marine judge advocates, but has no authority or direct role in the Marine Corps manpower policies or in the assignment of Marine judge advocates. The Panel concurred with the JAG that no additional authority over Marine judge advocate manpower policies and assignments is necessary or warranted. The Panel concluded that the Commandant, with the assistance of the SJA to CMC, is effectively managing Marine Corps judge advocate manpower, and the JAG is not best positioned to exercise additional authority in these areas.

Specific review of the authorities of the SJA to CMC over manpower policies and assignments within the Marine Corps suggest that the SJA to CMC has all the authorities necessary to effectively influence the formulation and application of manpower policies and assignments of judge advocates within the Marine Corps. The SJA to CMC is effectively integrated into the Marine Corps manpower system in his roles as the Occupational Field Manager and Functional Advocate for Marine judge advocates.

Finally, the Panel concluded that the role of the SJA to CMC should be clarified and strengthened in statute and regulation by establishing a direct relationship between the SJA to CMC and the Secretary of the Navy, by providing the SJA to CMC with the authority and responsibility to supervise the administration of military justice and legal assistance within the Marine Corps, and by providing the SJA to CMC the responsibility for the professional and

technical supervision of Marine judge advocates, consistent with the JAG's title 10 authorities and the role of the General Counsel. All the testimony and evidence on this point suggested that clarifying and strengthening the role of the SJA to CMC would improve the delivery of legal services within the Marine Corps, including the post-trial processing of courts-martial at the Service level, by institutionalizing clear lines of authority and accountability. The Panel agrees that legislation would provide the more enduring institutional basis for clarifying and strengthening the role of the SJA to CMC; the Panel also believes that the Departments of the Navy and Defense are best able to determine which particular functions need to be statutory or regulatory or both, and to draft such legislation and regulations.

I. Department of the Navy Legal Communities Today

The Department of the Navy (DON) consists of two uniformed Services: the United States Navy and the United States Marine Corps. That construct – a single Military Department, headed by a Secretary with responsibilities and authorities over two Services and their respective Service Chiefs – is unique among the Military Departments of the United States. In turn, it has resulted in a more complex alignment of legal resources.

For the purpose of providing a simplified, introductory description of the complex alignment of legal resources within the DON, the Panel finds it useful to rely on the approach published by the DON in *One Mission, One Team: A 21st Century Strategic Vision for Legal Support in the U.S. Department of the Navy*.¹ Three legal communities support the DON in its legal mission: the Office of the General Counsel (OGC), the Navy Judge Advocate General's Corps (JAG Corps), and the Marine Corps Legal Services community.

In Section VI of this report, the Panel will discuss in more depth the intricate relationships of authorities and responsibilities that exist among the three legal communities that are serving one Secretary. But we begin now by noting our agreement with the language that opens *One Mission, One Team: A 21st Century Strategic Vision for Legal Support in the U.S. Department of the Navy*, which states:

The three legal communities have roles and functions that are both independent and interdependent. Each has a unique identity, distinct roles and functions, and different areas of expertise based on history, organizational structure, culture, staffing, training and mission needs. However, they also share areas of practice and have common or complementary guiding principles and core values. They recognize that they must work together to identify, remedy and prevent gaps and seams in their legal services in order to best support the Department. Most importantly, the communities recognize that to support the Department of the Navy of the 21st Century, they must identify and collectively serve all of the legal needs of the Department as effectively and efficiently as possible.²

¹ *One Mission, One Team: A 21st Century Strategic Vision for Legal Support in the U.S. Department of the Navy* (undated) [hereinafter *DON Strategic Legal Vision*].

² *Id.* at 1.

A. Office of the General Counsel

The OGC consists of 708 full-time civilian attorneys³ and 193 supporting personnel.⁴ It is headed by the General Counsel, who is the chief legal officer of the Department of the Navy and the principal legal adviser to the Secretary of the Navy (SECNAV).⁵ OGC's primary function is to provide business and business-related legal advice and services to the Navy and Marine Corps, including Fleet and shore establishments, and the Military Sealift Command.⁶ OGC's principal areas of expertise include: acquisition law, including international transactions; business and commercial law; real and personal property law; civilian personnel and labor law; fiscal law; environmental law; intellectual property law; intelligence law; ethics and standards of conduct; Freedom of Information Act (FOIA) and Privacy Act law; and litigation related to these areas.⁷ OGC is organized as a law firm, with the General Counsel responsible for supervision and evaluation of all attorneys within OGC.^{8, 9}

³ Office of the General Counsel Memorandum, *Subj: Request for Information* (Aug. 31, 2010) (revised by E-mail from Danielle P. Bianchi, Assistant to the Deputy General Counsel, Office of the General Counsel, to Michael McGregor, Staff, Independent Review Panel to Study the Judge Advocate Requirements of the Department of the Navy (Nov. 18, 2010, 17:20 EST)).

⁴ Vice Admiral (VADM) James W. Houck, JAGC, USN, Judge Advocate General of the Navy, *Presentation to Panel Created Under Section 506 of the Fiscal Year 2010 National Defense Authorization Act*, 5 (Sep. 1, 2010) [hereinafter VADM Houck Presentation].

⁵ See 10 U.S.C. § 5019 (2010); U.S. Dep't of Navy, Sec'y of the Navy Instr. 5430.7Q, *Assignment of Responsibilities and Authorities in the Office of the Secretary of the Navy*, ¶ 7.(b)(5), at 13 (17 Aug. 2009) [hereinafter SECNAVINST 5430.7Q]; U.S. Dep't of Navy, Sec'y of the Navy Instr. 5430.25E, *The General Counsel of the Navy; Assignment of Responsibilities*, ¶¶ 3.-4, at 1-2 (27 Dec. 2005) [hereinafter SECNAVINST 5430.25E].

⁶ *DON Strategic Legal Vision*, *supra* note 1, at 3.

⁷ *Id.*; see also SECNAVINST 5430.25E, *supra* note 5, ¶ 4.c., at 2.

⁸ *DON Strategic Legal Vision*, *supra* note 1, at 4. The Office of the General Counsel (OGC) is organized as a single law firm in order to ensure the independence, consistency, and quality of the legal advice and counsel provided by OGC attorneys. *Id.* As integral members of client teams, OGC attorneys provide proactive legal advice and prevent legal impediments that could jeopardize the accomplishment of the Department of the Navy (DON) mission. *Id.* As the only primarily civilian organization providing legal support to the DON, OGC believes it is unique in its ability to develop in-depth expertise in a variety of areas vital to the DON mission and provide clients with continuity of support. *Id.*

⁹ Furthermore, by DoD instruction and SECNAV designation, the General Counsel is the qualifying authority to evaluate the qualifications of persons recommended for appointment, transfer, reassignment, or promotion as civilian attorneys within the DON, and to approve or disapprove such actions. The General Counsel has delegated this authority to the Judge Advocate General of the Navy and the Staff Judge Advocate to the Commandant of the Marine Corps for civilian attorneys practicing under their respective cognizance or supervision. U.S. Dep't of Defense Instr. 1442.02, *Personnel Actions Involving Civilian Attorneys*, *passim* (30 Sep. 2010); SECNAVINST 5430.25E, *supra* note 5, ¶ 4.c.(6)(d); Secretary of the Navy Memorandum, *Subj: Designation of General Counsel as the Qualifying Authority for Personnel Actions Involving Civilian Attorneys* (1 Jun. 1978); The General Counsel of the

In coordination with the Judge Advocate General of the Navy (JAG), the General Counsel is responsible for ensuring that the DON intelligence activities are conducted in a legal manner, and for providing or supervising legal advice and services with respect to legislation.¹⁰ In addition, the General Counsel assists the Under Secretary of the Navy in providing oversight of the Naval Criminal Investigative Service (NCIS).¹¹ The General Counsel also performs any other functions assigned by SECNAV consistent with law. The General Counsel maintains a close working relationship with the JAG and the Staff Judge Advocate to the Commandant of the Marine Corps (SJA to CMC) on matters of common interest.¹²

B. Navy JAGC Community

The Navy JAG Corps community consists of 811 active-duty judge advocates, 456 reserve judge advocates, 478 active-duty enlisted personnel (holding the legalman rating), 173 reserve enlisted personnel, and 409 civilian employees (including 50 full-time civilian attorneys).¹³ With an overall size of 2,327 personnel, the mission of the JAG Corps community is to provide legal solutions from a military perspective, whenever and wherever needed.¹⁴

The principal areas of practice in the Navy JAG Corps include military justice, international and operational law, admiralty law, environmental law, administrative law (which itself includes diverse sub-practice areas such as command relationships, legislation, military personnel law, installation law, FOIA/Privacy Act, and ethics), general litigation, claims, legal assistance, information operations, and intelligence law.¹⁵ The JAG Corps organizes these practice areas into three principal lines of operation: court-martial litigation, which accounts for approximately 20% of the practice; legal assistance, which accounts for approximately 15% of

Navy Memorandum, *Subj: Delegation of Qualifying Authority for Personnel Actions Involving Civilian Attorneys* (Feb. 3, 2011).

¹⁰ SECNAVINST 5430.25E, *supra* note 5, ¶ 4.c.(5), at 3; *DON Strategic Legal Vision*, *supra* note 1, at 5.

¹¹ SECNAVINST 5430.25E, *supra* note 5, ¶ 5.d., at 3.

¹² *Id.* ¶ 6., at 4.

¹³ Numbers current as of September 30, 2010. Note that on September 1, 2010 – the date the Judge Advocate General of the Navy (JAG) presented a detailed brief to the Panel – the number of active-duty judge advocates was 828. VADM Houck Presentation, *supra* note 4, at 5. Fluctuation in the inventory of judge advocates is discussed *supra* in Part II of this report.

¹⁴ *Id.* at 11.

¹⁵ U.S. Dep't of Navy, Sec'y of the Navy Instr. 5430.27C, *Responsibility of the Judge Advocate General of the Navy and the Staff Judge Advocate of the Marine Corps for Supervision and Provision of Certain Legal Services*, ¶ 4., at 2-4 (17 Apr. 2009) [hereinafter SECNAVINST 5430.27C].

the practice; and operational law and command advice, which accounts for approximately 65% of the practice.¹⁶

The Navy JAG Corps is headed by the JAG.¹⁷ The JAG is the senior uniformed legal officer in the DON. As such, the JAG is responsible for providing independent legal advice and opinions to SECNAV and the Chief of Naval Operations (CNO).¹⁸

The JAG has both Departmental and Service-level responsibilities. He reports to SECNAV and serves as a Staff Assistant to the Secretary.¹⁹ As a Staff Assistant, the JAG performs duties relating to legal matters arising in the Department as may be assigned by the Secretary of the Navy and acts on other matters as assigned by the Secretary.²⁰ He also “provides or supervises the provision of all legal advice and related services throughout the Department of the Navy, except for the advice and services provided by the General Counsel,”²¹ and he “provides legal and policy advice to the Secretary of the Navy on military justice, administrative law, claims, operational and international law, and litigation involving these issues.”²²

¹⁶ VADM Houck Presentation, *supra* note 4, at 13.

¹⁷ The JAG heads the JAG Corps. U.S. Dep’t of Navy, U.S. Navy Regulations 1990, arts. 0331, 1009 [hereinafter NAVREGS]; SECNAVINST 5430.7Q, *supra* note 5, ¶ 7.c.(5), at 18; SECNAVINST 5430.27C, *supra* note 15, ¶ 3., at 1. By statute, the JAG is appointed from judge advocates of the Navy or the Marine Corps who are members of the bar of a Federal court or the highest court of a State and who have had at least eight years of experience in legal duties as commissioned officers. 10 U.S.C. § 5148 (2010). NAVREGS are promulgated by the Secretary of the Navy under 10 U.S.C. § 6011 (2010). NAVREGS, *supra*, art. 0102. Article 0102 of NAVREGS provides: “Regulations issued under [10 U.S.C. § 6011] are permanent regulations of general applicability, as opposed to regulations issued by the Secretary under Article 0104.” *Id.* Article 0104, in turn, describes the Secretary's plenary authority under title 10 to issue regulations to carry out his or her functions. *Id.* art. 0104. NAVREGs Article 0103 provides: “United States Navy Regulations is the principal regulatory document of the Department of the Navy, endowed with the sanction of law, as to the duty, responsibility, authority, distinctions and relationships of various commands, officials, and individuals.” *Id.* art. 0103.

¹⁸ 10 U.S.C. § 5148(e).

¹⁹ NAVREGS, *supra* note 17, arts. 0310, 0331; SECNAVINST 5430.7Q, *supra* note 5, ¶ 3.a.(2), at 2, ¶ 7.c.(5), at 18; SECNAVINST 5430.27C, *supra* note 15, ¶ 4., at 2.

²⁰ 10 U.S.C. §§ 5014, 5148 (2010); NAVREGS, *supra* note 17, art. 0331; SECNAVINST 5430.27C, *supra* note 15, ¶ 4., at 2.

²¹ NAVREGS, *supra* note 17, art. 0331.

²² *Id.*; see also SECNAVINST 5430.7Q, *supra* note 5, ¶ 7.c.(5)(b), at 18; SECNAVINST 5430.27C, *supra* note 15, ¶ 7., at 4-5.

The JAG commands the Office of the Judge Advocate General (OJAG),²³ which supports him in the execution of his Departmental and Service-level responsibilities, and in his execution of responsibilities as the Department of Defense Representative for Ocean Policy Affairs.²⁴ Those latter responsibilities include representing the Department of the Defense in oceans policy matters at international and U.S. interagency meetings, negotiations, and conferences; developing Department of Defense positions in ocean and maritime policy matters; and providing advice and assistance to the Office of the Secretary of Defense and, upon request, to the Joint Staff.

The Secretary has assigned the JAG Service-level responsibilities. These responsibilities include serving as the Special Assistant for Legal Services to the Office of the Chief of Naval Operations.²⁵ In that role, the JAG “advises and assists the Chief of Naval Operations (CNO) in formulating and implementing policies and initiatives pertaining to the provision of legal services within the Navy.”²⁶ The JAG also makes all assignments of U.S. Navy judge advocates under direct statutory authority.²⁷

Judge advocates in the U.S. Navy are organized into a staff corps, which means they compete against only judge advocates for promotion, and command only activities appropriate to their staff corps.²⁸ The establishment of a staff corps of U.S. Navy judge advocates occurred in 1967,²⁹ eighteen years after the establishment of the Judge Advocate General's Corps in the U.S.

²³ NAVREGS, *supra* note 17, art. 0331; SECNAVINST 5430.7Q, *supra* note 5, ¶ 7.c.(5), at 18; SECNAVINST 5430.27C, *supra* note 15, ¶ 3., at 1.

²⁴ Deputy Sec’y of Defense Memorandum, *Subj: DoD Representative for Ocean Policy Affairs* (Nov. 8, 2009); see SECNAVINST 5430.27C, *supra* note 15, ¶ 6., at 4; see Chief of Naval Operations Notice 5430, *Change to the Organization of the Office of the Chief of Naval Operations (OPNAV), Special Assistant for Legal Services (N09J)*, enclosure (1) (May 18, 2007) [hereinafter OPNAVNOTE 5430] (updating Chief of Naval Operations Instr. 5430.48D, *Office of the Chief of Naval Operations (OPNAV) Organization Manual* (29 Mar. 1993)). The Panel notes that OPNAVNOTEs are typically stamped “canc frp” (canceled for record purposes) on a date one year from the date of their creation. Here, although OPNAVNOTE 5430 was stamped “canc frp May 08”, the Panel treats it as enduring authority because it contains a cancellation contingency indicating that it will not be canceled until “contents are incorporated into the OPNAV Organization Manual.” OPNAVNOTE 5430, *supra*, at 1. As of the writing of this report, the OPNAV Organization Manual has not been updated.

²⁵ SECNAVINST 5430.27C, *supra* note 15, ¶ 5., at 4; OPNAVNOTE 5430, *supra* note 24, enclosure (1).

²⁶ SECNAVINST 5430.27C, *supra* note 15, ¶ 5., at 4.

²⁷ 10 U.S.C. §§ 801, 806 (2010).

²⁸ 10 U.S.C. §§ 5148, 5150 (2010); NAVREGS, *supra* note 17, art. 1001.

²⁹ An Act to Establish a Judge Advocate General’s Corps in the Navy, Pub. L. No. 90-179, 81 Stat. 545 (1967).

Army and the Judge Advocate General's Department in the U.S. Air Force.³⁰ In establishing a separate staff corps for uniformed lawyers in the Navy, Congress found,

The establishment of a Judge Advocate General's Corps is not a new idea. It was considered at the time the Uniform Code of Military Justice was under consideration by the Congress. At that time the Judge Advocate General of the Navy suggested that the creation of a corps be postponed until after an evaluation of the special duty status of Navy lawyers could be made. This decision was possibly influenced also by doubts whether uniformed lawyers were really required on career basis. Now there is no question that uniformed lawyers will be a permanent part of the career Navy and it seems appropriate to recognize this and to give these lawyers the professional status and organization that other professional groups have enjoyed for many years.³¹

The legislative history indicates that Congress was also persuaded that a separate Navy staff corps was necessary in light of the increasing demand for, and complexity of, legal services provided by uniformed Navy lawyers.³²

Although organized into a staff corps, the Navy JAG Corps is less centralized than OGC. U.S. Navy judge advocates typically serve in one of three types of assignment: in OJAG, in the Naval Legal Service Command (NLSC), or as independent staff judge advocates (SJAs). Today, approximately 120 U.S. Navy judge advocates serve in OJAG,³³ approximately 369 serve in NLSC,³⁴ and the balance are SJAs who report independently to their respective commands or

³⁰ Effective February 1, 1949, the Elston Act established a Judge Advocate General's Corps for the Army. Military Selective Service Act of 1948, Pub. L. No. 80-759, 62 Stat. 604, 642-44 (1948). Under the authority of the Air Force Military Justice Act, on January 25, 1949, the Air Force issued General Orders No. 7 creating the Air Force Judge Advocate General's Department, which was later changed to the Judge Advocate General's Corps. U.S. Dep't of the Air Force, Washington, General Orders No. 7 (25 Jan. 1949).

³¹ S. Rep. No. 90-748, 90th Cong. (1st Sess. 1967), *reprinted in* 1967 U.S.C.C.A.N. 2113, 2115. The Senate report documented a significant growth in the demand for uniformed legal services in the Navy combined with an alarming reduction in the number of law specialists being retained in the Regular Navy. Junior officers serving as law specialists were leaving the Navy after completing their initial service obligation because of a lack of professional identity. *Id.* "Unless this trend is reversed, the Navy legal staff will be composed almost wholly of inexperienced junior officers serving their 3-year obligated tour of military duty." *Id.*

³² H.R. 12910, 90th Cong. (1st Sess. 1967) at 113 Cong. Rec. 27483, 27485 (daily ed. Oct. 2, 1967) (statements of Rep. Philbin and Rep. Bennett).

³³ The Office of the Judge Advocate General (OJAG) is in the executive part of DON. 10 U.S.C. § 5148. The primary mission of OJAG is to support the JAG in providing legal and policy advice to the Secretary of the Navy, *id.*, and to support the JAG in assisting the Chief of Naval Operations (CNO) in formulating and implementing policies relating to the delivery of legal services in the U.S. Navy, NAVREGS, *supra* note 17, art. 0331; SECNAVINST 5430.27C, *supra* note 15, ¶¶ 3., 5., at 1, 4; OPNAVNOTE 5430, *supra* note 24, enclosure (1).

³⁴ Naval Legal Service Command (NLSC) is a U.S. Navy, echelon 2 command under the CNO. See Chief of Naval Operations Notice 5400, *Standard Navy Distribution List (SNDL), Shore Chain of Command*, enclosure (4) (Oct. 1,

activities (to include assignments to Joint and combined commands).³⁵ NLSC includes the Naval Justice School, Region Legal Service Offices (RLSOs), and Naval Legal Service Offices (NLSOs). RLSOs principally provide prosecution services and command services to commands lacking SJAs. NLSOs principally provide defense services, legal assistance, and disability evaluation system assistance.

C. Marine Corps Legal Services Community

The Marine Corps Legal Services community is comprised of 435 active component Marine judge advocates, 331 reserve component Marine judge advocates, 17 active component legal administrative officers, 426 active component enlisted legal services specialists, and 13 career civilian attorneys.³⁶ Marine Corps Legal Services are the most de-centralized of the three legal communities within the Department of the Navy and within the Department of Defense (DoD). The Marine Corps does not have a JAG Corps. Based on their unique Service history, culture, and operational nature, the Marines are committed to the concept that all officers be unrestricted line officers, trained and indoctrinated as rifle platoon leaders, and developed as complete Marine Air-Ground Task Force (MAGTF) officers.³⁷ Similarly, judge advocates, as with all Marine officers, are assigned by the Commandant of the Marine Corps (the

2010) [hereinafter OPNAVNOTE 5400]; see also Chief of Naval Operations Instr. 5450.189B, *Mission and Functions of the Naval Legal Service Command* (Jan. 19, 2007) [hereinafter OPNAVINST 5450.189B].

³⁵ The balance of 339 also includes approximately 30 judge advocates in student assignments and 21 line officers attending law school under the Navy's Law Education Program. See *infra* Section II for a break-out of U.S. Navy judge advocate billets.

³⁶ All numbers are current as of September 30, 2010. The total active-duty judge advocates – 435 – only counts “4402 – judge advocates,” and does not include “4401 – student judge advocates.” As of December 1, 2010, the total number of judge advocates (4402) on active duty was 461, plus an additional 93 student judge advocates (4401), for a total inventory of 554. Active and reserve component numbers were provided by Manpower and Reserve Affairs, Headquarters, Marine Corps.

³⁷ The Marine Air-Ground Task Force (MAGTF) is the Marine Corps' principle organization for all missions across the range of military operations. U.S. Marine Corps, Marine Corps Doctrinal Publication (MCDP) 3, *Expeditionary Operations*, 69 (16 Apr. 1998) [hereinafter MCDP 3]. MAGTFs are general purpose forces of combined arms that can be tailored (task-organized) to the requirements of a specific situation. *Id.* Each MAGTF has four core elements: a command element (i.e., headquarters), ground combat element (e.g., units of infantry, artillery, or tanks), aviation combat element, and logistics support element. *Id.* at 70-71. There are both standing MAGTFs (e.g., Marine Expeditionary Units) and ad hoc mission-specific MAGTFs (e.g., SPMAGTF-Afghanistan). See *id.* at 75-77.

Commandant), and report directly and independently to the commanders³⁸ within the operating forces³⁹ and supporting establishment.⁴⁰

Principal areas of practice for Marine judge advocates include military justice, operational law, legal assistance, and administrative law. Marine judge advocates practice within these areas in two roles: command legal advisor or legal service support provider. Command legal advice is generally provided by SJAs. SJAs are assigned within the operating forces to the command elements of the standing Marine Expeditionary Forces (MEF) and headquarters of the Major Subordinate Commands (MSC),⁴¹ and within the supporting establishment to the headquarters for major bases and installations. SJAs provide independent legal advice to their commands on all matters within their cognizance, which generally includes military justice, operational, and administrative law. Legal service support is generally provided within the operating forces by Legal Service Support Sections (LSSS) and within the supporting establishment by Law Centers and Base SJA Offices.⁴² Legal service support is provided to Commanders, individual Marines and Sailors, and their families. This general support includes military justice services (prosecution, defense, and review), personal and family legal assistance, civil law/ethics, command investigations, and claims.

³⁸ The Marine Corps believes this construct “allows the commander to make the most efficient and effective use of legal assets, reinforces the relationship between the commander and assigned judge advocates, and builds mutual trust and responsiveness between the judge advocate and client base.” Staff Judge Advocate to the Commandant, U.S. Marine Corps, *Submission to the Independent Panel Review of Legal Requirements in the Department of the Navy*, 3 (31 Aug. 2010) [hereinafter *SJA to CMC Submission*].

³⁹ The Marine Corps’ organization consists of Headquarters, Marine Corps; the operating forces; the supporting establishment; and the Marine Corps Forces Reserve. The operating forces consist of Assigned Marine Corps Forces, Security Forces, and Fleet Marine Forces. All combat, combat support, and combat service support units are part of the Assigned Marine Forces, and are generally task-organized for employment as MAGTFs. See U.S. Marine Corps, Marine Corps Doctrinal Publication (MCDP) 1-0, *Marine Corps Operations*, 1-17 to -19 (27 Sep. 2001) [hereinafter *MCDP 1-0*].

⁴⁰ The supporting establishment assists in the training, sustainment, equipping, and embarkation of the operating forces. The supporting establishment includes entities such as Marine Corps Recruiting Command, Marine Corps bases and air stations, and recruit depots. *Id.* at 1-22.

⁴¹ The Marine Corps operating forces are, by statute, organized into three Marine Expeditionary Forces (MEFs). The MEF is the largest MAGTF and is composed of a command element (i.e., headquarters) and three Major Subordinate Commands (MSCs): the Marine Division, the Marine Air Wing, and the Marine Logistics Group. There is one additional MEF within the reserve component.

⁴² Under a local memorandum of agreement implemented in the mid-1990s, while in garrison, the three Legal Service Support Sections (LSSSs), located at Camps Lejeune (North Carolina), Pendleton (California) and Foster (Japan) provide military justice trial services to all commands on board the installation, both operating forces and supporting establishment commands. U.S. Marine Corps, *Marine Corps Legal Services - Strategic Action Plan 2010-2015*, 8 (2010) [hereinafter *USMC SAP*].

A small number of Marine judge advocates practice in additional areas, which include, for example, environmental, labor, and procurement law. Practice in these areas is generally limited to those Marines serving within the offices of the Counsel to the Commandant, which is a part of the Office of the General Counsel. In addition, to accomplish the broader mission of the Marine Corps, the DON, and the DoD, Marine judge advocates fill a variety of Joint, Departmental, and non-legal billets.⁴³

The senior judge advocate in the Marine Corps is the SJA to CMC and serves within Headquarters, Marine Corps.⁴⁴ The SJA to CMC performs those Departmental functions as assigned by the Secretary of the Navy. The SJA to CMC's primary Service-level responsibilities include providing legal advice to the Commandant and Headquarters, Marine Corps in designated practice areas; supervising the Chief Defense Counsel of the Marine Corps; serving as Rules Counsel for matters of professional responsibility involving Marine judge advocates; and serving as the Occupational Field Manager for all active-duty Marine judge advocates.⁴⁵ The SJA to CMC is supported by Judge Advocate Division (JAD), which is established within Headquarters, Marine Corps, and is composed of the SJA to CMC, a Deputy SJA to CMC, and several subordinate coded branches.⁴⁶

⁴³ *Id.* at 5.

⁴⁴ 10 U.S.C. § 5046 (2010). *See generally* 10 U.S.C. §§ 5041-5042 (2010) (explaining that Headquarters, Marine Corps is a Military Service Staff established within the executive part of the Department to “furnish professional assistance to the Secretary” and the Service Chief. Although the Commandant presides over Headquarters, Marine Corps, it performs its duties under the “authority, direction, and control of the Secretary of the Navy.”).

⁴⁵ *See* SECNAVINST 5430.27C, *supra* note 15, ¶ 8., at 5-6. The designated practice areas are: military justice, administrative law, international and operational law, and legal assistance matters. *Id.* ¶ 8.a., at 5. Together with the Counsel for the Commandant, the SJA to CMC also provides legal advice on standards of conduct and government ethics. *Id.* ¶ 8.h., at 6.

⁴⁶ The SJA to CMC serves as an O-8 (major general), 10 U.S.C. § 5046, and the Deputy SJA to CMC is an O-6 (colonel), per the Marine Corps Table of Organization. The SJA to CMC supervises all of the judge advocates within Judge Advocate Division (JAD). *See* U.S. Marine Corps Order P5800.16A, *Marine Corps Manual for Legal Administration (Short Title: LEGADMINMAN)*, ¶ 22004., at 22-5 (31 Aug. 1999, through Ch-5, 28 Nov. 2005) [hereinafter *LEGADMINMAN*]. JAD consists of the following coded branches: Military Law Branch (Code JAM); International and Operational Law Branch (Code JAO); Research and Civil Law (Code JAR); Legal Assistance Branch (Code JAL); Judge Advocate Support Branch (Code JAS); and Information, Plans, and Programs Branch (Code JAI). *See id.* ¶ 22004., at 22-5 to -6; *see also* <http://www.marines.mil/unit/judgeadvocate/Pages/Branches.aspx>.

D. The DON Legal Communities in Context to Other Military Department Legal Communities

Table 1, below, provides the number of attorneys in the Department of the Army, the Department of the Air Force, and the DON, as of September 30, 2010. The DON data is broken out into its two military Services.

	Army	Air Force	Navy	Marines
Office of the General Counsel¹	Total: 32	Total: 55	DON Total: 708²	
Political Appointees	2 (both vacant)	1	1	0
Career Civilian Attorneys	32 (4 x SES)	54 (7 x SES)	653 ³ (22 x SES) ⁴	54 (2 x SES)
JAG Corps/Marine Corps Legal Services	Total: 4,661	Total: 2,574	Total: 1,302	Total: 779
Active-Duty Judge Advocates	1,828	1,225	811	435
Career Civilian Attorneys	565 (2 SES)	408 (3 SES)	50	13
Reserve Judge Advocates	1,522	671	441	331
National Guard	746	270		
Flag/General Officers (AC/RC and Guard)	5/3	6/7	2/1	1/0
Army Materiel Command (All civilian attorneys)	Total: 319 (5 x SES)	Chart accurate as of September 30, 2010 ¹ OGC numbers do not include judge advocates assigned to OGC to prevent double counting. OGC totals include career Senior Executive Service (SES) and political appointees (unless unfilled), but not schedule C employees (Army 1, Air Force 1, and Navy 2). ² OGC attorneys serving USN and USMC offices and commands are all DON OGC attorneys. ³ U.S. Navy number of 653 includes OGC personnel assigned to the DON Secretariat. ⁴ U.S. Navy SES number of 22 includes 10 SES personnel assigned within the DON Secretariat.		
Army Corps of Engineers (All civilian attorneys)	Total: 449 (2 x SES)			

Table 1. Number of Attorneys in Department of the Army, Department of the Air Force, and Department of the Navy as of September 30, 2010

The data in Table 1, above, and Table 2, below, benchmarks the ratio of full-time attorneys to military Service end-strength, the ratio of reserve component judge advocates to military Service end-strength, and the ratio of active-duty flag and general officers to military Service end-strength.

	Army	Air Force	Navy	Marines
Service End-strength	566,045	334,196	328,303	202,441
Total Active-Duty Judge Advocates (x) to End-strength	(1,828) 1 to 310	(1,225) 1 to 273	(811) 1 to 405	(435) 1 to 465
Total full-time attorneys (x) to End-strength ¹	(3,193) 1 to 177	(1,688) 1 to 198	(1,515) ² 1 to 216	(502) 1 to 403
			DON total (2,017) 1 to 263	
Reserve Component Judge Advocates (x) to Active-Duty End-strength ³	(1,522) 1 to 372	(671) 1 to 498	(441) 1 to 744	(331) 1 to 612
Active-Duty Judge Advocate Flag/General Officers (x) to Active-Duty Judge Advocate End-strength	(5) 1 to 366	(6) 1 to 204	(2) 1 to 406	(1) 1 to 435
Chart accurate as of September 30, 2010. ¹ Includes active-duty judge advocates and civilians working for JAG, SJA to CMC, and OGC. ² USN total of 1,515 includes all OGC attorneys not assigned to the USMC. ³ Does not include the National Guard. Reserve attorneys in the Navy and Marine Corps are organized to support the active component.				

Table 2. Ratios of active component judge advocates to military Service end-strength, full-time attorneys to military Service end-strength, reserve component judge advocates to military Service end-strength, and active-duty flag/general officers to active-duty judge advocate end-strength as of September 30, 2010

As indicated above, the judge advocate to end-strength ratios, total attorneys to end-strength ratios, and the judge advocate leadership to end-strength ratios in the Department of the Navy reveal that the Department of the Navy has significantly fewer attorneys per end-strength than does the Department of the Army or the Department of the Air Force.

II. The Navy and Marine Corps Manpower Management Systems

The Panel's primary mandate is to conduct an independent review of the judge advocate requirements in the Department of the Navy (DON). Section III of this report addresses the Panel's independent determination of the number of judge advocates required to fulfill the legal mission of the DON. In arriving at that independent determination, the Panel considered the DON's existing plans for future judge advocate manning. Although the Panel did not consider itself to be constrained by those plans given its mandate, the Panel recognized that the Navy and Marine Corps have well-developed manpower management systems designed to achieve, within fiscal restraints, a force that has the capabilities and capacity to prevail in war, prevent and deter conflict, and execute the additional priorities established by the President and the Secretary of Defense. The Panel decided, therefore, that it was appropriate to provide an overview of the Navy and Marine Corps manpower management systems before turning to its independent determination.

The Navy and Marine Corps manpower management systems operate in the context of the Department of Defense Planning, Programming, Budgeting, and Execution System (PPBES).⁴⁷ The PPBES is an iterative, cyclical, four-phase process, which for purposes of military manpower management can be summarized as follows:⁴⁸

⁴⁷ See Chief of Naval Operations Instr. 1000.16K, *Navy Total Force Manpower Policies and Procedures*, § 1 of enclosure (1), ¶ 100.3.a., at 1-2 (22 Aug. 2007) [hereinafter OPNAVINST 1000.16K]; U.S. Marine Corps Order 5311.1D, *Total Force Structure Process (TFSP)*, 3 (26 Feb. 2009) [hereinafter MCO 5311.1D]; U.S. Marine Corps Order 3900.15B, *Marine Corps Expeditionary Force Development System (EFDS)*, 3-5 (10 Mar. 2008). As described in OPNAVINST 1000.16K:

[Total force] requirements become authorized positions if they are supported by resources (i.e., are funded). Resources are provided through the Planning, Programming, Budgeting and Execution System (PPBES). . . . The ultimate objective of PPBES is to provide the best mix of total forces, equipment and support attainable within fiscal constraints. PPBES enables senior leadership to assess alternative ways to achieve the objectives established by the President and the Secretary of Defense. The decisions from the PPBES involve balancing near term readiness, sustainability and force structure requirements with long-term modernization needs to ensure warfighting capability today and in the future.

OPNAVINST 1000.16K, *supra*, ¶ 100.3.a.-b., at 1-2.

⁴⁸ U.S. Dep't of Defense Financial Mgmt. Regulation, Volume 1-15, § 2A (Sep. 2007); see U.S. Dep't of Defense, Dir. 7045.14, *The Planning, Programming, and Budgeting System*, ¶¶ 3.1., 4.1.-4.3., at 1-3 (May 22, 1984) (Certified Current as of Nov. 21, 2003); see U.S. Dep't of Defense Handbook 7045.7-H, *Future Years Defense Program (FYDP) Structure* (Apr. 2004). See generally <http://comptroller.defense.gov/budget2010.html> (providing information on

- Phase one: the planning phase.** In this phase, senior officials in the U.S. government broadly identify capabilities required to meet national security objectives. Principal documents developed in this phase include the National Security Strategy,⁴⁹ the Quadrennial Defense Review,⁵⁰ the National Military Strategy,⁵¹ Strategic Planning Guidance, Defense Planning and Programming Guidance, and the Combatant Commanders' Integrated Priority List.⁵² For the Navy and Marine Corps, additional key documents include the Maritime Strategy,⁵³ the Naval Operations Concept,⁵⁴ and annual planning guidance from the Chief of Naval Operations⁵⁵ and the Commandant of the Marine Corps.⁵⁶
- Phase two: the programming phase.** In this phase, fiscal constraints are introduced into the process, with the goal of prioritizing capabilities and balancing resources in a way that most efficiently manages risk. The main product in this phase is the Program Objectives Memorandum (POM). Annually, the Department of the Navy submits a POM that describes the resources and programs, including military manpower, which it believes necessary to provide required capabilities, within an acceptable level of risk, and within previously identified programming targets.⁵⁷ This continuing cycle of annual POM submissions informs a Future Years Defense Program (FYDP), which serves as the

the Department of Defense budget); <http://www.finance.hq.navy.mil/fmb/10pres/books.htm> (providing information on the Department of the Navy budget); http://www.whitehouse.gov/omb/circulars_a11_current_year_a11_toc/ (providing information on the President's budget process).

⁴⁹ President of the United States, *National Security Strategy* (May 2010).

⁵⁰ U.S. Dep't of Defense, *Quadrennial Defense Review Report* (Feb. 2010) [hereinafter *QDR*].

⁵¹ *The National Military Strategy of the United States of America, A Strategy for Today; A Vision for Tomorrow* (2004) (2004 version under revision).

⁵² *The Strategic Planning Guidance, Defense Planning and Programming Guidance, and Combatant Commander's Integrated Priority List* are not released outside the Department of Defense and thus were not considered by the Panel.

⁵³ *A Cooperative Strategy for 21st Century Seapower* (Oct. 2007), available at www.navy.mil/maritime/Maritimestrategy.pdf.

⁵⁴ *Naval Operations Concept: Implementing the Maritime Strategy (2010)*, available at <http://www.navy.mil/maritime/noc/NOC2010.pdf>.

⁵⁵ *CNO Guidance for 2011: Executing the Maritime Strategy* (Oct. 2010), available at <http://www.navy.mil/features/CNOG%202011.pdf>.

⁵⁶ *35th Commandant of the Marine Corps Commandant's Planning Guidance (2010)*, available at <http://www.usmc.mil/unit/hqmc/cmc/Documents/CMC%2035%20Planning%20Guidance%20FINAL.pdf>.

⁵⁷ See Deputy Sec'y of Defense Memorandum, *Subj: Procedures and Schedule for Fiscal Year (FY) 2012-2016 Integrated Program/Budget Review* (Apr. 9, 2010). Beginning in April 2010, the Department of Defense moved to an annual programming cycle. *Id.* Program Objectives Memorandum (POMs) are submitted every year and programming decisions are reflected in Future Years Defense Program (FYDP). *Id.*

five-year baseline for future programming and budget submissions. The FYDP, in turn, is updated each year by a new POM.

- **Phase three: the budgeting phase.** The objective of this phase is to develop the President's budget — essentially to organize an appropriations request — consisting of the resources previously identified in the programming phase. The President's budget includes military manpower line items for each Service. The President's budget request is submitted to Congress in February.
- **Phase four: the execution phase.** In this phase, after an appropriations bill becomes law, it is the responsibility of the Department of the Navy to execute the budget for that fiscal year.

In a single year, all four phases are pursued simultaneously. As of the writing of this report, the Department of the Navy is executing its Fiscal Year (FY) 2011 budget, submitting its 2012 budget request to the Department of Defense, developing its 2013 POM, and refining its organization, strategy, and doctrine.

A. Today's Fiscal Environment

Funding force structure modernization, while winning two wars, and without increasing the budget topline, is the central fiscal challenge facing the Department of Defense (DoD) over the 2012-2016 FYDP, according to the Secretary of Defense.⁵⁸ To meet that challenge, the Secretary has directed the Military Departments and other defense components to cut at least \$100 billion in overhead costs, in order to transfer those savings into combat power and force structure modernization.⁵⁹ In May of 2010, the Secretary of Defense stated,

Therefore, as the Defense Department begins the process of preparing next's years Fiscal Year 2012 budget request, I am directing the military services, the joint staff, the major functional and regional commands, and the civilian side of

⁵⁸ See Robert M. Gates, Sec'y of Defense, Defense Opening Statement for Senate Appropriations Committee, Room 192, Dirksen Senate Office Building (Jun. 16, 2010) [hereinafter Gates, Opening Statement for Senate Appropriations Committee], available at <http://www.defense.gov/speeches/speech.aspx?speechid=1488>; see Robert M. Gates, Sec'y of Defense, Remarks at the Eisenhower Library, Abeline, Kan: Defense Spending (May 8, 2010) [hereinafter Gates, Remarks at Eisenhower Library], available at <http://www.defense.gov/speeches/speech.aspx?speechid=1467>.

⁵⁹ Robert M. Gates, Sec'y of Defense, Statement on Department Efficiencies Initiative at the Pentagon (Aug. 9, 2010), available at <http://www.defense.gov/speeches/speech.aspx?speechid=1496>.

the Pentagon to take a hard, unsparing look at how they operate – in substance and style alike. The goal is to cut our overhead costs and to transfer those savings to force structure and modernization within the programmed budget. In other words, to convert sufficient “tail” to “tooth” to provide the equivalent of the roughly two to three percent real growth – resources needed to sustain our combat power at a time of war and make investments to prepare for an uncertain future.⁶⁰

One month later, in testimony before the Senate Appropriations Committee, the Secretary of Defense stated,

We are already beginning the next step in this process of reform as we prepare the fiscal 2012 budget. Last month I called on the Pentagon to take a hard, unsparing look at how the department is staffed, organized and operated. This initiative is not designed to reduce the defense topline. I believe the current topline is the minimum needed to sustain a military at war and to protect our interests in the years to come in an ever more unstable and dangerous world. Rather, my goal is to significantly reduce our overhead costs in order to free up the resources needed to sustain our force structure, to modernize, and create future combat capabilities while living within our current topline.

To this end, the department has recently set a goal to find more than \$100 billion in overhead savings over the five fiscal years starting in FY 12. No organization within the department, including my own office, will be excluded from these efforts.⁶¹

The Secretary also called particular attention to the budgetary pressures on the Department of the Navy. In a speech before the Navy League of the United States, the Secretary criticized the unsustainable costs of specific shipbuilding programs, and concluded with this observation,

It is important to remember that, as the wars recede, money will be required to reset the Army and Marine Corps, which have borne the brunt of the conflicts. And there will continue to be long-term – and inviolable – costs associated with taking care of our troops and their families. In other words, I do not foresee any significant increases in top-line of the shipbuilding budget beyond current assumptions. At the end of the day, we have to ask whether the nation can really

⁶⁰ Gates, Remarks at Eisenhower Library, *supra* note 58.

⁶¹ Gates, Opening Statement for Senate Appropriations Committee, *supra* note 58.

afford a Navy that relies on \$3 to 6 billion destroyers, \$7 billion submarines, and \$11 billion carriers.⁶²

The Panel recognizes the fiscal pressures on the DoD as a whole and, in particular, the requirement for the DON to cut overhead in order to sustain combat power, modernize force structure, and reset the Marine Corps. Accordingly, in its analysis of judge advocate requirements, the Panel considered that there are not only risks from having too few judge advocates, but also from having too many judge advocates in a zero-sum-gain FYDP.

B. U.S. Navy Judge Advocate Manpower Management

On September 30, 2010, the authorized end-strength⁶³ of active-duty judge advocates in the U.S. Navy was 811.⁶⁴ In October 2010, the Bureau of Naval Personnel published its projected authorized end-strength for FY 11 and the FYDP as follows:

Fiscal Year	11	12	13	14	15	16
End-Strength	801	782	745	746	747	747

Table 3. Projected U.S. Navy Judge Advocate Authorized End-Strength

As illustrated, the U.S. Navy has programmed for a 6.7% reduction in the authorized end-strength of active-duty judge advocates over the next five years.⁶⁵ To understand how U.S. Navy

⁶² Robert M. Gates, Sec’y of Defense, Remarks at the Navy League Sea-Air-Space Exposition at the Gaylord Convention Center, National Harbor, Md. (May 3, 2010), available at <http://www.defense.gov/speeches/speech.aspx?speechid=1460>.

⁶³ See U.S. Dep’t of Defense, Instr. 1120.11, *Programming and Accounting for Active Military Manpower*, enclosure (2), at 8 (Apr. 9, 1981, Incorporating Change 1, Oct. 30, 2007) [hereinafter DoDI 1120.11] (defining end-strength as “Strength at the end of a fiscal year and synonymous with end-year strength.”); OPNAVINST 1000.16K, *supra* note 47, appendix B to enclosure (1), at B-6 (defining end-strength as: “The number of officer and enlisted requirements which can be authorized (funding) based on approved budgets. End-strength is set forth for each activity in the FYDP.”).

⁶⁴ On September 1, 2010, when the JAG testified to the Panel, the inventory of judge advocates on active duty was 828 and the projected authorized end-strength for the fiscal year ending later that month (September 30, 2010) was 800. However, the final fiscal year end-strength for U.S. Navy judge advocates issued by the Bureau of Naval Personnel was 811, or 11 over the original projection of 800.

⁶⁵ The data in Table 3 is from the Fall 2010, Officer Programmed Authorizations (OPA). The 6.7% reduction in active-duty judge advocate authorized end-strength is based primarily on the programmed loss of 31 billets to support the Office of Military Commissions (OMC) and the programmed loss of 23 “adaptive core” billets to support contingency operations. The Office of the Secretary of Defense (OSD) provides funding for OMC billets on a renewable basis, and the current funding authorization will expire in December 2012. OMC requirements are discussed further in Section III.C., *infra*, of the report. In Fiscal Year 2010, the Navy received an increase in end-

judge advocate authorized end-strength is programmed, a brief review of the Navy Total Force Manpower System is necessary.

The U.S. Navy's Total Force Manpower System “is a complex process with many interdependent roles.”⁶⁶ The Chief of Naval Personnel is the single manpower resource sponsor, with responsibility to “Assess, validate, and approve manpower requirements.”⁶⁷ The Commander, U.S. Fleet Forces Command and the heads of the Navy's warfare enterprises⁶⁸ “Assess and validate the required capabilities and . . . [m]ake manpower funding recommendations to the manpower resource sponsor. . . .”⁶⁹ Budget Submitting Offices (BSOs), which are generally aligned with the Navy's echelon II commands, have responsibilities to “(1) Develop Mission, Function and Task [(MFT)] statements . . . (2) Oversee the day-to-day management of manpower authorizations . . . [and] (3) Initiate the shore manpower requirements process.”⁷⁰

Insofar as determining judge advocate manpower requirements are concerned, the Navy's BSOs drive the process.⁷¹ They “determine and validate” the peacetime and wartime judge advocate requirements for themselves and their subordinate commands and staffs.⁷² They also make decisions on whether to fund, on behalf of the Chief of Naval Operations or the Secretary of the Navy,⁷³ the manpower requirements that have been identified and validated.⁷⁴ Funded

strength of 2,700 personnel (\$1.8B), applicable across the Future Years Defense Program (FYDP), to partially compensate the Navy for its provision of personnel as Individual Augmentees (IA) in support of contingency operations. The Navy's internal distribution of those 2,700 “adaptive core” billets included providing the JAG Corps with 23 billets to support rule of law operations in Iraq and Afghanistan.

⁶⁶ OPNAVINST 1000.16K, *supra* note 47, § 1 of enclosure (1), ¶ 100.6., at 1-4.

⁶⁷ *Id.* § 1 of enclosure (1), ¶ 100.6.a., at 1-4.

⁶⁸ See Jessie Riposo et al., *Navy Enterprises: Evaluating Their Role in Planning, Programming, Budgeting and Execution (PPBE)* (Rand Corporation, 2009).

⁶⁹ OPNAVINST 1000.16K, *supra* note 47, § 1 of enclosure (1), ¶ 100.6.b.(1)-(2), at 1-5.

⁷⁰ *Id.* § 1 of enclosure (1), ¶ 100.6.d.(1)-(5), at 1-5.

⁷¹ See OPNAVINST 1000.16K, *supra* note 47, § 4 of enclosure (1) (stating that a Budget Submitting Office (BSO) must submit its manpower requirements via the cognizant Navy enterprise to the Director of the Total Force Management Division at the Bureau of Naval Personnel (OPNAV N12) for final approval); U.S. Navy Bureau of Naval Personnel, *Manpower Management Coding Directory*, §§ 7, 12 (26 Aug. 2008) [hereinafter *BUPERS Manpower Management Coding Directory*].

⁷² OPNAVINST 1000.16K, *supra* note 47, § 4 of enclosure (1), ¶ 400.5.a.-b., at 4-2.

⁷³ See *id.* § 4 of enclosure (1), ¶ 400.6., at 4-3 (funding decisions made with input of enterprise sponsor, if applicable).

⁷⁴ Although funding decisions, or authorizations, are made by BSOs, they are subject to the overall programmatic management of the Chief of Naval Personnel. The Chief of Naval Personnel is responsible for aligning

manpower requirements are referred to as “Billets Authorized” or BA.⁷⁵ “Billets” in the Navy are the individual positions carried on a unit's activity manning document. “Funded” means the application of programmed end-strength.⁷⁶

BSOs can choose from a range of techniques to determine manpower requirements.⁷⁷ In general, regardless of technique employed, BSOs must identify the MFTs required to be performed at specific units, and measure the workload required to achieve an acceptable level of readiness for those particular MFTs.⁷⁸ Officer manpower requirements are then calculated using (1) the applicable “Navy standard work week” to determine the *quantity* of manpower required,⁷⁹ and (2) the Navy's Officer Manpower and Personnel Classification system to determine the

authorizations to programmed end-strength – a process known as manpower balancing. *See id.* § 7 of enclosure (1), at 7-1 to -6.

⁷⁵ *See id.* §§ 4, 7 of enclosure (1).

⁷⁶ *See id.* § 7 of enclosure (1), ¶ 700.3.a., at 7-1. Not all manpower requirements are necessarily funded. When manpower requirements differ from funding levels, the excess or shortfall is required to be addressed during the next phase of the Planning, Programming, Budgeting, and Execution System (PPBES). *Id.* § 4 of enclosure (1), ¶ 400.6., at 4-3.

⁷⁷ *See* OPNAVINST 1000.16K, *supra* note 47, § 4 of enclosure (1), ¶ 400.6., at 4-3; *see* Navy Manpower Analysis Center, *Navy Total Force Manpower Requirements Handbook* (Apr. 2000). Budget Submitting Offices are permitted to use a variety of “techniques” to determine manpower requirements, including: industrial engineering studies, industry standards, operational evaluations, functionality assessments, procedures established in Office of Management and Budget Circular A-76, application of staffing standards, mathematical models, business process re-engineering, lean six sigma, better business practices, or other methodologies approved by CNO (N12). OPNAVINST 1000.16K, *supra* note 47, § 4 of enclosure (1), ¶ 402.3.h., at 4-12. Of note, the February 2008 Center for Naval Analyses (CNA) analysis of future U.S. Navy judge advocate manpower requirements, discussed further in Section III.G., *infra*, of the report, is an example of one type of “other methodologies approved by CNO (N12).” *See id.*

⁷⁸ They are also directed to ensure that the workload is “materially related” to one or more “mission essential tasks,” which are registered in the Defense Readiness Reporting System. *Id.* § 4 of enclosure (1), at 4-10 to -14. Mission essential tasks are derived from the master catalog of tasks described in the Universal Joint Task List, Chairman of the Joint Chiefs of Staff Manual 3500.04E, *Universal Joint Task Manual* (25 Aug. 2008) [hereinafter CJCSM 3500.04E], and the Universal Naval Task List, OPNAVINST 3500.38B/MCO 3500.26/USCG COMDTINST 3500.1B, *Universal Naval Task List (UNTL) Version 3.0* (Jan. 2007, through CH-1 1, 10 Nov. 2008). Tasks in the Universal Joint Task List (UJTL) are categorized by level of war into Strategic National (SN), Strategic Theater (ST), Operational (OP), and Tactical (TA). CJCSM 3500.04E, *supra*, enclosure B. There are few UJTL tasks that expressly list a judge advocate office as the Office of Primary Responsibility (OPR); however, there are hundreds of UJTL tasks that require regular legal support and virtually every task will require legal support, directly or indirectly.

⁷⁹ Under Appendix C of OPNAVINST 1000.16K, the Navy calculates manpower requirements based on: peacetime, wartime, or mobilization; whether the command under study is afloat or ashore; and whether the command is located in a place where dependents are authorized. OPNAVINST 1000.16K, *supra* note 47, appendix C to enclosure (1). Thus, there are different “Navy standard workweeks” for: (1) shipboard manning during war (81 hours gross, 70 hours productive); (2) ashore and shipboard manning during peacetime in locations at which dependents are authorized (40 hour gross, 33.38 hour productive); (3) ashore and shipboard manning in peacetime at locations in which dependents are not authorized (57 hour gross, 49.6 hour productive); and (4) ashore manning during mobilization, defined as emergency operations and combat build-up (60 hours gross, 57.22 hours productive). *Id.* § 4 of enclosure (1), ¶ 402.3., at 4-10 to -11, appendix C to enclosure (1).

quality of the manpower required.⁸⁰ For judge advocate manpower determinations, *quality* refers to the rank and specialty skills required of the judge advocate to perform the required work.⁸¹ BSOs must calculate the minimum quantity and quality of manpower required to “efficiently accomplish the activity's mission.”⁸² Once manpower requirements are determined by a BSO, they are recorded on a Statement of Manpower Requirements (SMR) and forwarded to the Director, Total Force Requirements Division⁸³ for final approval. Once approved, the requirements are recorded in the Navy's Total Force Manpower Management System database.⁸⁴ BSOs are also required to continually review and update manpower requirements.⁸⁵ BSOs effect minor changes via “Billet Change Requests” (BCRs) and major changes via new SMRs.⁸⁶

⁸⁰ U.S. Dep't of Navy, *Manual of Navy Officer Manpower and Personnel Classifications, Volume II: Major Code Structures*, 19 (Oct. 2010).

⁸¹ See OPNAVINST 1000.16K, *supra* note 47, § 2 of enclosure (1), ¶ 200.4., at 2-2.

⁸² *Id.* In addition to determining the quantity and quality of manpower required, the Budget Submitting Office (BSO) must determine whether military manpower is required at all. Using “Manpower Mix Criteria” and a “Decision Matrix tool,” the BSO determines whether the requirement can be met by military or civilian personnel, or contracted for. *Id.* § 2 of enclosure (1), ¶ 200.5., at 2-2. Contracting for attorney services is not an option in almost all situations, as the longstanding opinion of the General Counsel of the Navy is that the provision of legal advice to the Department of the Navy and its Services is an inherently governmental function. See The General Counsel of the Navy Memorandum, *Subj: Out-Sourcing Legal Services* (Jul. 9, 1997) (including a copy of a U.S. Dep't of Justice, Office of Legal Counsel Letter (Mar. 23, 1975)); see also U.S. Dep't of Justice, Office of Legal Counsel, *Constitutional Limits on “Contracting Out” Department of Justice Functions Under OMB Circular A-76* (Apr. 27, 1990), at 1990 WL 488475 (O.L.C.). “A requirement/position is military if the successful performance of duties is required: (1) for reasons of law, executive order, treaty, or international agreement; or (2) for command and control of crisis situations, combat readiness, risk mitigation, or esprit de corps; or (3) when unusual working conditions are not conducive to civil service employment; or (4) when military [personnel] provide a more cost effective source of support; or (5) when military-unique knowledge and skills are required for successful performance of the duties.” OPNAVINST 1000.16K, *supra* note 47, § 2 of enclosure (1), ¶ 200.5.a.(1)-(5), at 2-2 to -3.

⁸³ Director, Total Force Requirements Division is a flag officer on the staff of the Chief of Naval Operations, identified by the staff code of OPNAV (N12).

⁸⁴ OPNAVINST 1000.16K, *supra* note 47, § 4 of enclosure (1), ¶ 400.5., at 4-2 to -3.

⁸⁵ *Id.*

⁸⁶ Minor changes are defined by exception as those that do not require preparation of a new Statement of Manpower Requirements (SMR). New SMRs can be directed by a Budget Submitting Office (BSO), a warfare enterprise, or the Chief of Naval Personnel. New SMRs are mandatory when there are major Mission, Function and Task (MFT) revisions, significant changes in workflow as a result of technological changes or changes in fleet force structure, or in response to status of forces agreements, inter-service support agreements, or other types of memoranda of agreement or understanding. *Id.*

Today, 11 Navy BSOs and 5 activities outside of the Navy fund a total of 801 judge advocate Billets Authorized (BA).⁸⁷ Of the 11 Navy BSOs, there are a “top five” that source 85% of the total judge advocate BA.⁸⁸ Table 4, below, displays these in descending order:

Billet Submitting Offices	Billets Authorized
Field Support Activity (FSA) ¹	369
Department of the Navy, Administrative Assistant (DON/AA) ²	120
Commander, U.S. Fleet Forces Command	81
Naval Education and Training Command	65 ³
Commander, U.S. Pacific Fleet	48
¹ Field Support Activity (FSA) provides resources for the Naval Legal Service Command. ² Department of the Navy, Administrative Assistant (DON/AA), previously identified as the Administrative Assistant to the Under Secretary of the Navy, sources billets within the Secretariat, including billets within the Office of the Judge Advocate General, the Navy-Marine Corps Appellate Review Activity, and the Navy-Marine Corps Court of Criminal Appeals. ³ Includes 21 billets authorized for line officers attending law school through the Navy-funded Law Education Program (LEP). Those 21 officers, known as LEPs, have Navy designator 1950 while in law school and convert to designator 2500 (judge advocate) once admitted to a State bar.	

Table 4. Top Five Navy Billet Submitting Offices that Source 85% of Judge Advocate Billets Authorized

Before discussing the role of the Judge Advocate General of the Navy in the U.S. Navy manpower management system, five additional technical items merit brief mention.

First, the total U.S. Navy judge advocate BA of 801 includes 30 billets in the “Individuals Account,” which is a special category to cover the requirements relating to students, trainees,

⁸⁷ Data obtained from the Navy Total Force Manpower Management System (TFMMS) is current as of October 27, 2010. The five outside activities are the Defense Intelligence Agency, National Security Agency, Office of the Secretary of Defense, U.S. Transportation Command, and the Joint Chiefs of Staff. The Navy treats them as BSOs within the Navy TFMMS, as they have “purchased” specific judge advocate billets through manpower funding transfers to the Navy. TFMMS is the single, authoritative manpower database for Navy. OPNAVINST 1000.16K, *supra* note 47, appendix B to enclosure (1), at B-18; BUPERS *Manpower Management Coding Directory*, *supra* note 71, at §§ 7, 12. See also Navy Manpower Analysis Center, *Position Management Business Requirement, Ver. 1* (18 Mar. 2010).

⁸⁸ The other six Navy BSOs with responsibility for determining judge advocate requirements are, in descending order: Central Operating Activity (COA) (Billets Authorized (BA) of 23) (Note: The COA is a division within the Bureau of Personnel with responsibility to manage authorizations from outside agencies); Naval Special Warfare Command (BA 17); Bureau of Medicine (BA 15); Naval Personnel Command (BA 6); Naval Reserve Force (BA 2); and the Office of Naval Intelligence (BA 1).

transients, medical patients, prisoners, and personnel awaiting discharge.⁸⁹ The Chief of Naval Personnel determines the Individuals Account.⁹⁰ For the judge advocate community, the student portion of the Individuals Account is especially important, as it is the basis for funding post-graduate education, which is discussed further in Section III.F. of this report.

Second, the Chief of Naval Personnel is responsible for managing the relationship between end-strength and BA. Ideally, BA and end-strength will be the same; however, there are a variety of situations in which there might be variances. For example, emergent manpower requirements outside the Navy, which were not programmed for within the Navy budget, may have to be met by Navy personnel at the direction of the President or the Secretary of Defense. Or, a BSO or warfare enterprise might realize manpower efficiencies beyond programmed savings. Moreover, a specific manpower community may not be executing to its full programmed manpower authorization due to delays in recruiting, training, or promoting qualified personnel. The Navy refers to the process of aligning end-strength and BA as “manpower balancing,”⁹¹ and the results of that balancing are reflected in community-specific Officer Programmed Authorizations (OPA).⁹² OPA is calculated via a computer program called Programmed Manpower Authorizations System (PMAS), which executes a variety of algorithms to achieve the most efficient and effective distribution of end-strength. Typically, for small communities like the judge advocate community, OPA and BA are the same or very close. For example, for FY 10, both BA and OPA were 801. To the extent that there are variances between BA and OPA in the U.S. Navy judge advocate community in any year, BA is the indicator of judge advocate manpower requirements as determined by BSOs, and OPA is the indicator of end-strength programmed for distribution to the judge advocate community as determined by the Chief of Naval Personnel.⁹³

⁸⁹ See OPNAVINST 1000.16K, *supra* note 47, § 1 of enclosure (1), ¶ 100.2.b.(3), at 1-2, § 5 of enclosure (1), appendix B to enclosure (1).

⁹⁰ OPNAVINST 1000.16K, *supra* note 47, § 1 of enclosure (1), ¶ 100.2.b.(3), at 1-2.

⁹¹ *Id.* § 7 of enclosure (1), ¶ 701.4., at 7-3 to -4.

⁹² Officer Programmed Authorization (OPA) is defined as: “A recurring, published document projecting planned officer authorizations for current and future FYs (budget and program years). Planned authorizations are summarized by designator and paygrade within designator for each FY and controlled precisely to the approved end strength for each FYs.” *Id.* appendix B to enclosure (1), at B-12. OPA is published twice each fiscal year in the Navy. *Id.* § 7 of enclosure (1), ¶ 705.2., at 7-19.

⁹³ OPA and BA are almost identical for the judge advocate community across the current FYDP as indicated below:

Third, separate from BA and OPA, there is an “inventory” of judge advocates on active duty in the Navy at any given moment in time. Inventory can fluctuate depending upon a variety of factors including the number of officers in the accessions pipeline or the number awaiting retirement or discharge. But inventory cannot exceed authorized end-strength as of the last day of the fiscal year. In October 2010, there was an inventory of 821 judge advocates on active duty in the Navy.⁹⁴

Fourth, the Navy also fills manpower requirements outside of the Navy, including, but not limited to, the White House, the State Department, the Office of the Secretary of Defense, the Joint Chiefs of Staff, and NATO.⁹⁵ The Navy does not determine the manpower requirements for organizations and agencies outside the Navy, but it participates in the processes whereby those requirements are identified, validated, and funded.⁹⁶ Typically, an executive agent having authority over the outside command or activity is responsible for justifying the manpower requirements.⁹⁷ Funding (end-strength) is either provided at the direction of the Secretary of Defense or negotiated via a manpower memorandum of agreement.⁹⁸

Fifth, the Navy also provides temporary manning to combatant commands and Joint Task Forces (JTFs) through Individual Augmentation (IA) procedures.⁹⁹ The supported combatant command or JTF identifies the temporary manpower requirements necessary to accomplish an

	FY 11	FY 12	FY 13	FY 14	FY 15	FY 16
BA	801	782	745	746	747	747
OPA	801	784	747	748	749	749

⁹⁴ See Letter from VADM James W. Houck, Judge Advocate General of the Navy, to Mr. Daniel J. Dell’Orto, Chairman, Independent Review Panel (Ser 00/0102) (Sep. 29, 2010) [hereinafter VADM Houck Letter (Ser 00/0102)].

⁹⁵ OPNAVINST 1000.16K, *supra* note 47, §§ 5, 7 of enclosure (1), at 5-3, 7-14 to -18.

⁹⁶ See *id.* §§ 5, 7 of enclosure (1), at 5-3, 7-16.

⁹⁷ See *id.*

⁹⁸ *Id.* § 7, at 7-16. The Total Force Requirements Division acts as Navy’s “military manpower coordinator” for requirements outside of the Navy, including the permanent peacetime positions at Joint commands. The Division represents the Navy in the Joint Requirements Validation Board and Defense Agency Manpower Review process, and manages Navy end-strength as it is applied against Joint billets.

⁹⁹ See Chairman of the Joint Chiefs of Staff Instr. 1301.01C, *Individual Augmentation Procedures*, 2 (1 Jan. 2004, Current as of 16 Dec. 2008) [hereinafter CJCSI 1301.01C] (“An IA is an unfunded temporary duty position identified on a [Joint Manning Document] by a supported [combatant commander] to augment staff during contingencies.”); see Chief of Naval Operations Instr. 1001.24, *Individual Augmentation (IA) Policy and Procedures*, ¶ 3., at 2 (5 Jul. 2000) [hereinafter OPNAVINST 1001.24]. See generally CJCSM 3500.04E, *supra* note 78.

assigned mission and records them on a “Joint Manning Document (JMD).”¹⁰⁰ The supported commander forwards the JMD to its subordinate Service component commanders with instructions on which positions are to be filled by each Service.¹⁰¹ If there are positions on the JMD that cannot be filled by the Service component commanders, the JMD is forwarded to the Joint Staff.¹⁰² The Joint Staff prioritizes the remaining unfilled positions and works with both the supported commander and the Services to find sourcing solutions by consensus.¹⁰³ If consensus cannot be reached, a formal sourcing board is convened and recommended solutions (and dissenting views) are forwarded to the Secretary of Defense for adjudication.¹⁰⁴

JMD positions tasked to the Navy for sourcing are reviewed by the Deputy Chief of Naval Operations for Operations, Plans, and Strategies (N3/N5), who determines whether the Navy's sourcing solution will come from the active or reserve components. If the solution will come from the active component, N3/N5 works with Commander, U.S. Fleet Forces Command to identify the specific military personnel who will serve as IAs.

For judge advocate IA requirements, an informal process is worked in parallel with the formal process described above. As soon as the supported commander begins to articulate a requirement for judge advocate IAs, sourcing solutions are sought via an informal Joint Legal Support Sourcing Working Group convened by U.S. Joint Forces Command.¹⁰⁵

C. The Role of the Judge Advocate General in the Navy

The Judge Advocate General of the Navy (JAG) is not a Budget Submitting Office (BSO), and he has no authority to determine judge advocate requirements or authorize judge advocate billets in the DON or in the U.S. Navy as a Service.¹⁰⁶ The JAG does, however, have an important degree of influence in the determination of judge advocate manpower requirements

¹⁰⁰ CJCSI 1301.01C, *supra* note 99, ¶¶ 1.b., 5.a., 5.c., at 1-2, ¶ 1.a.(1) of enclosure (A), at A-1; see OPNAVINST 1001.24, *supra* note 99, ¶ 2., at 1, enclosure (2), at 3. See generally CJCSM 3500.04E, *supra* note 78.

¹⁰¹ CJCSI 1301.01C, *supra* note 99, enclosure (A).

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ Joint Chiefs of Staff, Joint Publication 1-04, *Legal Support to Military Operations, passim* (1 Mar. 2007) [hereinafter JP 1-04].

¹⁰⁶ As a three-star (O-9), the JAG can influence judge advocate manpower determinations through his professional relationships with the senior flag officers in command of Navy Budget Submitting Offices (BSOs) or through his reporting relationship to the Chief of Naval Operations.

within Field Support Activity (FSA) and the Department of the Navy, Administrative Assistant (DON/AA), which together account for 62% of the community. As Vice Admiral (VADM) James W. Houck, JAGC, USN, Judge Advocate General of the Navy, explained to the Panel, the JAG is a customer of the FSA and the DON/AA; they provide him with resources for, respectively, the Naval Legal Service Command (NLSC) and the Office of the Judge Advocate General (OJAG).¹⁰⁷ The JAG and the NLSC Commander initiate the processes whereby judge advocate manpower requirements are determined by the FSA and the DON/AA.

The JAG also exercises influence within the Bureau of Naval Personnel. The Bureau has designated officer community managers,¹⁰⁸ including a manager for the judge advocate community, who is a senior judge advocate selected by the JAG. That officer, supported by the JAG, is responsible for developing Judge Advocate General's Corps accession plans and promotion plans, monitoring the balancing of judge advocate end-strength and Billet Authorization (BA), and reviewing Billet Change Requests (BCRs) and Statement of Manpower Requirements (SMRs) before action is taken by the Director of the Total Force Manpower Division.¹⁰⁹ That means the JAG influences, but does not control the size and shape of, the JAG Corps. It also means that he has visibility into the judge advocate manpower determinations made by BSOs, although for the 38% of the JAG Corps falling outside the FSA and the DON/AA, that visibility officially does not occur until the penultimate step in the approval process.

The Judge Advocate General, by statute, makes all judge advocate assignments in the Navy.¹¹⁰ The JAG assigns four officers to the Bureau of Naval Personnel to work as assignments detailers for the JAG Corps. The JAG also personally approves the individual assignments of all judge advocates in the rank of lieutenant commander and higher.¹¹¹

¹⁰⁷ VADM James W. Houck, JAGC, USN, Judge Advocate General of the Navy, Transcript of September 1, 2010 Hearing, at 239 [hereinafter VADM Houck Testimony].

¹⁰⁸ The Officer Community Management (OCM) Division of the Bureau of Naval Personnel "manages community requirements for all active component and reserve component (including Full-Time Support (FTS)) officer communities." <http://www.npc.navy.mil/Officer/CommunityManagers/>.

¹⁰⁹ See generally OPNAVINST 1000.16K, *supra* note 47.

¹¹⁰ 10 U.S.C. § 5148.

¹¹¹ The JAG and two senior Navy flag officers emphasized to the Panel in open testimony the importance of the role of the Judge Advocate General in making judge advocate assignments in the Navy. VADM Houck Testimony, *supra* note 107, at 160-63; VADM Harry B. Harris, Jr., USN, Commander, U.S. Sixth Fleet, Transcript of October 13,

The JAG is responsible for recruiting officers into the JAG Corps,¹¹² and for providing initial and continuing professional training to judge advocates in the Navy, Marine Corps, and Coast Guard.

D. Marine Judge Advocate Manpower Management

1. Structure.¹¹³ The Marine Corps Total Force Structure Process establishes the necessary structure for each organizational unit of the Marine Corps. This structure is identified on unit Tables of Organization (T/O).¹¹⁴ The T/O represents the total personnel requirement for each command, tabulated by billet,¹¹⁵ Military Occupational Specialty (MOS),¹¹⁶ and grade necessary to accomplish the unit's particular mission. Accordingly, the T/O includes any organic judge advocate requirements (e.g., 1st Marine Logistics Group (MLG) headquarters T/O includes a requirement for one Marine officer, with a Primary MOS (PMOS) of 4402 (judge advocate), in the grade of O-5 (lieutenant colonel), to serve as the SJA).¹¹⁷ The cumulative T/Os constitute the optimal force structure for a fully manned Marine Corps. Ideally, the total number of billets in this structure, requiring a PMOS of 4402, represents the total number of judge advocate positions that must be filled to meet the Marine Corps' enduring Service-level legal

2010 Hearing, at 17-19 [hereinafter VADM Harris, Jr. Testimony]; VADM John M. Bird, USN, Director, Navy Staff, Transcript of October 13, 2010 Hearing, at 26 [hereinafter VADM Bird Testimony].

¹¹² VADM Houck Testimony, *supra* note 107, at 164-67.

¹¹³ MCO 5311.1D, *supra* note 47, ¶ 32. of enclosure (1), at 8-5 (defining "Force Structure" as the "number, size and composition of Marine Corps units required to perform the Marine Corps mission essential tasks.").

¹¹⁴ *Id.* ¶ 75. of enclosure (1), at 8-11 (defining Table of Organization and Equipment (T/O&E) as "A report which contains the organizational mission statement, manpower, and equipment requirements and authorizations for the organization to perform its mission."). For purposes of this review, the Panel will only refer to the T/O, rather than T/O&E, as this is limited to the manpower requirements of the organization.

¹¹⁵ "Billet" refers to the official title of a particular duty assignment, e.g., "Staff Judge Advocate (SJA), II Marine Expeditionary Force (MEF)."

¹¹⁶ Every Marine, after completing initial entry-level training, attends a formal in-service school to receive education in a particular career field (e.g., Naval Justice School for judge advocates and enlisted legal service specialists). See U.S. Marine Corps Order 1200.17B, *Military Occupational Specialties Manual (Short Title: MOS Manual)*, enclosure (1) (15 Apr. 2010) [hereinafter MCO 1200.17B]. After completing this education, each Marine is assigned a Military Occupational Specialty (MOS) denoted within the Marine Corps manpower system by a four-digit numerical code. *Id.* For example, Marine judge advocates are designated 4402, Marine enlisted legal service specialists are designated 4421, and Marine legal administrative officers are designated 4430. *Id.* This initial MOS is their primary MOS or "PMOS." *Id.* MOSs are grouped together into functional areas, known as "Occupational Fields" or OccFld. *Id.* The OccFld for any particular MOS is denoted by the first two digits of the MOS numerical code (e.g., the OccFld for 4402 is 44). *Id.*

¹¹⁷ Each requirement, or billet, on the T/O will have a corresponding "Primary" MOS (PMOS) and a "Billet" MOS (BMOS). The PMOS identifies which Primary MOS community must fill the billet (e.g., 4402 – judge advocate), whereas the BMOS identifies the requisite skills an officer must have for that particular billet (e.g., 4409 – Masters of Criminal Law).

mission. Force structure also accounts for enduring Departmental and Joint Service judge advocate billets required to be filled by the Marine Corps.¹¹⁸ The Marine Corps' 4402 structure, as with all other Marine Corps structure, is managed by the Deputy Commandant for Combat Development and Integration (DC CD&I) via the Total Force Structure Division (TFSD). TFSD uses top-down strategic guidance,¹¹⁹ policy restraints/constraints,¹²⁰ and commanders' bottom-up recommendations¹²¹ to determine the T/O required for each unit within the Marine Corps.¹²² As of September 30, 2010, the Marine Corps had 376 structured billets requiring a PMOS of 4402.¹²³ Approved structure for the past five years, the current execution year, and out-years in the Future Years Defense Program (FYDP) are listed below in Table 5. The Panel notes two significant points: first, since 2006 the Marine Corps has added over 35 billets to its 4402 structure; second, this data does not reflect an additional 32 billets, validated by the 2010 Marine Corps Capabilities Assessment Review (CAR), which are pending inclusion in the T/O starting in FY 15. The CAR will be discussed further in Section III.G., *infra*.

¹¹⁸ See MCO 5311.1D, *supra* note 47, ¶ 4.a.2.(p), at 6. These billets are referred to respectively as "external billets" (e.g., billets within the DON's OJAG) or Joint Duty Billets (e.g., billets within the Office of Legal Counsel to the Chairman, Joint Chiefs of Staff (CJCS)). These billets are not found on any Marine unit Table of Organization. MCO 1200.17B, *supra* note 116, enclosure (1). Rather, the former are aligned with a "billet sponsor" within Headquarters, Marine Corps (e.g., SJA to CMC) and the latter are maintained by the Joint Officer Matters Officer (JOMO) at Deputy Commandant for Manpower and Reserve Affairs (DC M&RA). See MCO 5311.1D, *supra* note 47, ¶ 3. of enclosure (1), at 5-4 to -8. The four digit numeric coding for these billets is 90XX. *Id.* enclosure (1).

¹¹⁹ Top-down strategic guidance includes the National Security Strategy, National Defense Strategy, National Military Strategy, Joint Vision, and the Commandant's Planning Guidance. *Id.* ¶ 3.b. of enclosure (1), at 1-2.

¹²⁰ *Id.* ¶ 3.a. of enclosure (1), at 1-1. Policy restraints/constraints include an array of legislative and executive policies, e.g., limitations on general officer and senior enlisted billets.

¹²¹ *Id.* ¶ 3.b. of enclosure (1), at 1-2. Bottom-up recommendations include input from Marine Forces (MARFOR) commanders as well as other operating forces and supporting establishment commanders.

¹²² As part of this development process, Total Force Structure Division (TFSD), in concert with Subject Matter Experts (SMEs) from the Marine Air-Ground Task Force (MAGTF) and functional advocates (e.g., SJA to CMC is the Functional Advocate for legal services), evaluate each unit's mission statement and associated Mission Essential Tasks (METs), and determine the right skills by grade and quantity needed to accomplish that particular unit's mission and METs. *Id.* Those skills are then mapped to an MOS, as identified in the MOS Manual. See *generally* MCO 1200.17B, *supra* note 116.

¹²³ Recognizing that many of the senior billets within this structure require further education and training in a particular area of concentration, Judge Advocate Division (JAD) has worked with Commanding General, Training and Education Command (TECOM) to add additional judge advocate MOSs to the 44XX occupational field within the MOS system. See *id.* enclosure (1). These additional MOSs include 4405 - Master of International Law, 4406 - Master of Environmental Law, 4407 - Master of Labor Law, 4408 - Master of Procurement Law, 4409 - Master of Criminal Law, and 4410 - Master of Law (General). *Id.* JAD then worked with Total Force Structure Division (TFSD) to code the Billet MOS (BMOS) for many of these 376 structured 4402 billets, so that they are required to be filled with judge advocates who were assigned an additional MOS from the 4405-10 series. See USMC SAP, *supra* note 42, at 24, annex F, at 3-6. Each of these additional MOSs is referred to as a Necessary MOS (NMOS), as it is necessary for a Marine to obtain one of these additional MOSs to be fully qualified for the particular billet. MCO 1200.17B, *supra* note 116, enclosure (1).

Fiscal Year	06	07 ¹	08 ²	09 ³	10 ⁴	11 ⁵	12 ⁶	13 ⁷	14	15	16
Structure	340	341	350	354	366	378	388	376	376	376	376
¹ Reflects elimination of one billet in Okinawa, and addition of two operational law billets within Joint commands. ² Reflects elimination of one billet at Headquarters, Marine Corps, addition of four operational law billets within Joint commands, and addition of six billets within SJA offices at Quantico, VA; New Orleans, LA; and Camp Lejeune, NC. ³ Reflects addition of one operational law billet in Center for Law and Military Operations (CLAMO) at Charlottesville, VA, addition of two billets within SJA offices at Quantico, VA, and one operational law instructor billet at Quantico, VA. ⁴ Reflects elimination of one billet at U.S. European Command (EUCOM), and addition of 13 billets for Office of Military Commissions (OMC) requirement. ⁵ Reflects addition of eight billets for Guam, addition of one operational law billet at Marine Cyber Command, and three billets in SJA offices at Quantico, VA. ⁶ Reflects addition of two billets for Guam, and addition (actually re-coding) of seven billets for Marine Expeditionary Unit (MEU) SJAs and one Deputy SJA in II MEF (Marine Expeditionary Force). ⁷ Reflects elimination of 13 OMC billets at end of FY 12, and addition of one labor law billet.											

Table 5. Structure

This structure reflects the active management by TFSD, Judge Advocate Division (JAD), and individual commands to effect a series of incremental changes in an effort to maintain alignment between structure and actual mission requirements.¹²⁴

2. Authorized Strength Report.¹²⁵ Fiscal realities require the Marine Corps to prioritize the force structure to determine what portion of each unit’s structure will be authorized for funding. The Commandant does this through a Manning and Staffing Precedent Order,¹²⁶ which delineates “excepted commands”¹²⁷ – those units whose structure will be funded at 100%, and “priority commands”¹²⁸ – those units whose structure will be funded at 95%.¹²⁹ All

¹²⁴ Some of these historical and on-going efforts will be discussed further in Section III.G., *infra*.

¹²⁵ MCO 5311.1D, *supra* note 47, ¶ 7. of enclosure (1), at 8-2 (defining the Authorized Strength Report (ASR) as “A report publishing the portion of the force structure which, within budgetary constraints, is authorized to be filled – utilized by Deputy Commandant for Manpower and Reserve Affairs (DC M&RA) for planning the future, and distributing the current, personnel inventory of the Marine Corps.”).

¹²⁶ U.S. Marine Corps Order 5320.12G, *Precedence Levels for Manning and Staffing, passim* (8 Jan. 2010) [hereinafter MCO 5320.12G].

¹²⁷ *Id.* ¶ 4.a(2)(b)1., at 3. Excepted Commands include, for example, Marine Expeditionary Unit (MEU) Command Elements, which will in 2012 include one 4402 major to serve as the MEU Staff Judge Advocate (SJA) for each of the seven MEU command elements. *See id.*

¹²⁸ *Id.* ¶ 4.a(2)(b)2., at 3. Priority Commands include all operating forces, including the SJAs within the command elements of the Marine Expeditionary Forces (MEFs) and their major subordinate commands, as well as the 4402s serving as service providers at the Legal Service Support Section (LSSS). *Id.* Priority Commands also include all external billets, formal schools, and Headquarters, Marine Corps billets. *See id.*

¹²⁹ *Id.*

remaining commands are delineated as “proportionate share commands,”¹³⁰ – those units whose structure is funded based on the remaining funding available.¹³¹ The outcome of this formulation is published in the Authorized Strength Report (ASR). TFSD publishes the ASR semiannually, in February and August. The report includes the current year ASR, as well as the five out-years in the FYDP, subject to change pursuant to variations in manning precedents. These figures, as well as the ASRs for the past five years, are listed below in Table 6. Consistent with Table 5, above, which depicts structure, the figures for ASR below do not account for the approved addition of 32 billets to the 4402 structure in FY 15.

Fiscal Year	06	07	08	09	10	11	12	13	14	15	16
ASR	333	306	311	330	361	362	365	354	353	352	353

Table 6. Authorized Strength Report

The ASR is utilized by the Deputy Commandant for Manpower and Reserve Affairs (DC M&RA) for planning the future, and assigning the current, personnel inventory of the Marine Corps.

3. Inventory. DC M&RA, Manpower Plans (MP), plans and manages Marine Corps personnel inventory.¹³² DC M&RA (MP) converts the forecasted ASRs through a computer modeling process to create a Grade Adjusted Recapitulation (GAR) – a series of forecasted target inventories. The GAR provides the basis for all manpower planning activities associated with inventory development, including accessions, promotions, and retention.

¹³⁰ *Id.* ¶ 4.a(2)(b)3., at 3. For example, Proportionate Share (Pro Share) Commands may be made up of remaining supporting establishment forces, including judge advocates assigned to the SJA offices for most bases and stations. *See id.*

¹³¹ *See id.* However, those particular billets within Priority or Pro-Share Commands, requiring a Necessary MOS such as 4405 - Master of International Law, are funded at 100%. SJA to CMC *Submission, supra* note 38, at 10.

¹³² “Inventory” is the total number of officers within a given MOS category actually serving on active duty at any given time. For judge advocates, this could include both 4402 (judge advocate) and 4401 (student judge advocate). The inventory at the end of each fiscal year should ideally be the same number as the Grade Adjusted Recapitulation (GAR) requirement for that particular MOS category. The Marine Corps restricts its use of the term “end-strength” to the legislative connotation which is the number of all officers in the Marine Corps on active duty at the end of the fiscal year. Therefore, individual MOS officer communities do not have a particular “end-strength.” Rather, it is more appropriate to speak of the total number of Marine judge advocates in terms of “inventory” and “requirements” – the planned target inventory.

This modeling process first pulls the funded structure from the ASR by MOS, and then allocates a proportionate share of “free” B-Billets¹³³ and P2T2 (patient, prisoner, transient, trainee)¹³⁴ to that particular MOS. Free B-Billets are those billets which any Marine Air-Ground Task Force (MAGTF) officer can fill, regardless of MOS, in order to contribute to the broader mission of the Marine Corps. The modeling process allocates each MOS community a share of free B-Billets proportionate to the relative size of that MOS community in the ASR. P2T2 is the number of Marines of a particular MOS forecasted to be in a patient, prisoner, trainee or transient status at any given time, based on a particular MOS’s training standards and historical trends. Similar to the Navy’s “Individual’s Account,” P2T2 represents the “overhead” required to build and maintain an inventory of sufficient quantity and quality of judge advocates. These totals (structure + B-Billets + P2T2), are organized by grade, and then adjusted for legislative grade constraints. The result of this modeling process is the GAR – the target inventory.

The GAR provides the planning basis for building and shaping appropriately sized inventories of judge advocates to meet projected legal requirements as well as the broader mission requirements of the Marine Corps such as B-Billets, command, and opportunities for

¹³³ Billets are categorized as either A-Billets, Free B-Billets, or Necessary B-Billets, depending on their MOS coding. Each billet is coded on a unit Table of Organization (T/O) with two types of MOSs: a Primary MOS (PMOS) and a Billet MOS (BMOS). The PMOS identifies which MOS community must fill the billet, whereas the BMOS identifies the requisite skills an officer must have for that particular billet. Billets are then categorized as A-Billets or B-Billets based on the coding of the PMOS and BMOS. A-Billets are those billets that require the skill sets of a specific PMOS, and therefore the BMOS and the PMOS are the same, e.g., 4402. B-Billets are those billets on a unit T/O in which the BMOS is coded for something other than a PMOS. In such cases, the BMOS is coded with either a Free MOS (FMOS) or a Necessary MOS (NMOS), and hence referred to as either a “Free B-Billet” or a “Necessary B-Billet.” In the case of free B-Billets, the PMOS and BMOS are both coded with the FMOS of 8006, which means that billet may be filled by any PMOS community and requires only the general skills of any Marine Air-Ground Task Force (MAGTF) officer. Necessary B-Billets, on the other hand, are required to be filled by a particular PMOS community, such as 4402, and the billet duties involve some other requisite skills. For example, a Necessary B-Billet may be coded for a PMOS of 4402 and a BMOS of 4405-4410. The 4405-4410 series are NMOSs assigned to Marine judge advocates as an additional MOS, after they have received specialized training and skills (e.g., 4405 is assigned to Marines who obtain an LL.M. in International Law, and 4409 is assigned to Marines who obtain an LL.M. in Criminal Law). Necessary B-Billets requiring a PMOS of 4402 may also be coded for a BMOS of 8007, which means the billet requires the general skills of any MAGTF officer. These are typically used on T/Os for education and training commands, where the Marine Corps believes it is beneficial to have a variety of PMOSs represented on the particular staff, although the billet, often an instructor, only requires the general skills of any MAGTF officer. MCO 1200.17B, *supra* note 116, enclosure (1), at x, 1-3, 1-138 to -142.

¹³⁴ DoDI 1120.11, *supra* note 63, *passim*. P2T2 represents the number of Marine officers, of a particular MOS, who are forecasted to be in one of the following statuses at any given time: a *patient* – hospitalized for longer than 30 days; a *prisoner* – incarcerated for longer than 30 days, but less than 6 months; a *transient* – in the process of executing a change of station/assignment orders; or a *trainee* – in entry-level accessions training or training in excess of 20 weeks. *Id.* For judge advocates, this includes 4401 “student judge advocates.”

training and Professional Military Education. Table 7, below, provides the GAR for the current execution year and out-years in the FYDP. Consistent with Table 6, above, which depicts ASR, the figures for the GAR do not account for the approved addition of 32 billets to the 4402 structure in FY 15.

Fiscal Year	11	12	13	14	15	16
GAR	543	541	540	531	530	532

Table 7. Grade Adjusted Recapitulation

Forecasted inventories are then built and shaped by recruiting, accessions, education, training, and promotion.¹³⁵ DC M&RA determines the judge advocate accession mission required each fiscal year to maintain the required number of judge advocates in future years. This accession mission planning takes into account expected attrition, career selection, promotion rates, and the future years’ requirements. Marine Corps Recruiting Command (MCRC) is responsible for meeting each fiscal year’s judge advocate accession mission. After accession to the active force, judge advocates then enter the training pipeline, which is managed by Training & Education Command (TECOM). Naval Justice School (NJS) provides the training and education for each judge advocate to obtain their Primary MOS (PMOS). Actual inventories in the judge advocate community are subject to fluctuations from planned or projected inventories due to unforeseen changes in attrition rates or civilian market conditions.

4. Assignments. The Commandant makes all assignments of Marine Corps officers, including judge advocates.¹³⁶ “Assignments” means the issuing of orders transferring

¹³⁵ As will be discussed further in Sections III.F. and IV., *infra*, the Marine Corps has taken aggressive measures to maintain an appropriate inventory of judge advocates. DC M&RA has increased the accessions mission by 71% since FY 08 (from 35 to 60 annually). The Law School Education Debt Subsidy increased by 50% in FY 11 (from \$30,000 to \$45,000 annually). Two Return to Active Duty Boards were conducted in FY 10 and FY 11, returning 12 officers to active duty as judge advocates. Already, the judge advocate inventory has improved from 75% of the O-1 to O-5 requirement in October 2009 to 94% of the O-1 to O-5 requirement in October 2010. Additionally, judge advocates were precepted as critically short on the FY 12 colonel selection board. ALNAV 074/10 announced that 11 Marine judge advocates had been selected by the FY 12 Selection Board for promotion to colonel. Message 231654Z NOV 10, ALNAV 074/10, *Subj: FY12 U.S. Marine Corps Colonel Selections* [hereinafter ALNAV 074/10]. As of December 1, 2010 the Marine Corps’ 4402 (judge advocate) inventory had increased to 461, and the 4401 (judge advocate student) inventory to 91, for a total inventory of 554, slightly above the GAR.

¹³⁶ See 10 U.S.C. § 806.

someone on a permanent basis to a new billet, within a new command, at a new duty location. These orders are referred to as a “Permanent Change of Station” (PCS) orders.¹³⁷ This authority is delegated to DC M&RA. DC M&RA, Manpower Management (MM), uses a modeling process, which compares the current, funded billets within the ASR to current, assignable inventory of judge advocates to develop “staffing-goals.”¹³⁸ Each year assignments of judge advocates to particular units are then made consistent with that unit’s staffing goal.¹³⁹ The staffing goal gives priority to filling A-Billets¹⁴⁰ within the ASR. When assigning a staffing goal to a B-Billet manning requirement, the staffing goal model considers the relative “health” of a particular occupational field’s (e.g. 44XX) inventory. If, during any given year, there are inventory shortfalls for a particular occupational field, that field will receive fewer staffing goals for B-Billet requirements.

DC M&RA (MM) determines which officer, amongst the pool of officers eligible for PCS orders, will be assigned to that particular unit, based on the following priorities (in order of precedence):¹⁴¹

- needs of the Marine Corps;
- MOS/billet variety;
- availability of the individual;
- Overseas Control Date;
- seniority; and

¹³⁷ An assignment, made by Permanent Change of Station (PCS) orders, is also referred to as a “permanent assignment.” The Panel will use the term “permanent assignment” throughout this report to refer to assignments made by PCS orders.

¹³⁸ MCO 5320.12G, *supra* note 126, ¶ 4.a.(1)(a)-(b), at 1-2; MCO 5311.1D, *supra* note 47, ¶ 68. of enclosure (1), at 8-10.

¹³⁹ *See generally* MCO 5311.1D, *supra* note 47. In response to requirements imposed by higher authority, or urgent, un-programmed requirements, Marine judge advocates may be assigned in excess of an organization’s structural requirements. *See id.* ¶ 4.a.(2)(q), at 7. Such additional assignments are called “overstaffs” and are to be approved by Deputy Commandant for Manpower and Reserve Affairs (DC M&RA) and are to be of short duration. *Id.* Overstaff requests in excess of three years require submission of a Table of Organization and Equipment Change Request (TOECR) by the requesting unit to establish a permanent requirement. *Id.*

¹⁴⁰ A-Billets are those billets that require the skill sets of a specific Primary MOS. Therefore the Billet MOS and the Primary MOS are the same, e.g., 4402.

¹⁴¹ U.S. Marine Corps Order P1300.8R W/ CH 1-8, *Marine Corps Personnel Assignment Policy* (4 Oct. 1994).

- individual preference.

Once officers' assignments are approved, they are issued PCS orders transferring them to their new assignments. Generally, officers are required to serve a minimum of 36 months at the location of their new assignment.¹⁴²

Although officers, judge advocates included, are assigned based on a particular unit's funded, structured billets – or staffing goals – the officer is actually ordered to report for duty to the Commanding General (CG) within the superior chain of command of the respective unit. The CG has the discretion to detail the officer to any duties, based on the needs of that particular unit. For example, a particular unit, such as a Legal Service Support Section (LSSS) within the Marine Logistics Group (MLG), will generally have a staffing goal for several company grade judge advocates based on funded trial/defense counsel billets on the LSSS Table of Organization (T/O). However, upon reporting for duty, the MLG CG may detail a judge advocate to serve as staff secretary or as a company commander. This ability to reassign incoming personnel allows the commander, who is generally best positioned, to task-organize his resources in such a way as to best accomplish the mission. The impact on the legal community is tempered by the fact that this reassignment only occurs with respect to a small minority of officers, is typically only for one year out of three, provides that particular officer a career broadening opportunity, and occurs only to the extent the CG believes it does not risk accomplishment of the current legal mission.

5. Individual Augmentation. In addition to permanent assignments, Marine judge advocates may be temporarily assigned to Joint Service duties as Individual Augmentees (IA).¹⁴³ IA requirements, as identified on a Joint Manning Document (JMD) for a particular Joint Task Force (JTF), to be filled by the Marine Corps are first tasked to the respective Marine forces component commander. If the component commander cannot fill the requirement, it will be forwarded to the Deputy Commandant for Manpower and Reserve Affairs (DC M&RA) for validation and global sourcing. If DC M&RA cannot fill the requirement from within the active component, then it will be forwarded to Commander, Marine Forces Reserve to

¹⁴² *Id.* ¶¶ 1100-1101, at 1-3 to -4. This is referred to as the "Time On Station" (TOS) requirement. After serving the minimum TOS, an officer is eligible for PCS orders to a new duty station assignment.

¹⁴³ See generally U.S. Marine Corps Order 1001.61, *Policy and Procedures for Sourcing Personnel to Meet Individual Augmentation (IA) Requirements* (5 May 2000) [hereinafter MCO 1001.61] (establishing policies and procedures for sourcing judge advocates to meet IA requirements).

fill from within the reserve component. These duty assignments are generally six months in duration, during which time the parent Marine command receives no manpower compensation or relief. Therefore, the duties that were left behind by the judge advocate assigned as an IA must be performed by personnel remaining within the unit.

6. Tables of Organization and Equipment Change Request. As inventory and assignments are driven largely by the Authorized Strength Report (ASR), which is in turn driven largely by structure requirements, it is critical to ensure unit Tables of Organization (T/Os) are actively managed to reflect current requirements. Commanders, staff, and headquarters organizations review unit T/Os to identify necessary force structure changes. Billet structure may be modified through a T/O and Equipment Change Request¹⁴⁴ (TOECR). TOECRs may call for the addition or deletion of structure, the realignment of structure, or modifications to existing structure such as the Military Occupational Specialty (MOS) or grade required. A request for additional structure for a particular command, without any off-set from another command, is called an “uncompensated” request.¹⁴⁵ Uncompensated requests amount to an increase in overall force structure. As such, all uncompensated requests must be first vetted through an annual Uncompensated Review Board (URB), and then approved by the Commandant.¹⁴⁶ A request that seeks to realign structure from one command to another command is a “compensated” request.¹⁴⁷ Compensated structure changes are approved by Total Force Structure Division (TFSD), on behalf of the Commandant.

7. Occupational Field Management. Within this system, the SJA to CMC is the Occupational Field Manager¹⁴⁸ and Functional Advocate¹⁴⁹ for the Marine Corps’ 44XX

¹⁴⁴ See MCO 5311.1D, *supra* note 47, ¶ 2. of enclosure (1), at 5-1 to -2.

¹⁴⁵ See *id.* ¶ 4.a.(2)(m), at 6, ¶ (7) of enclosure (1), at 5-6, ¶ 20. of enclosure (1), at 8-3.

¹⁴⁶ *Id.* Uncompensated Tables of Organization (T/O) change requests submitted by the SJA to CMC must be signed by the Director, Marine Corps Staff, then vetted through the annual Uncompensated Review Board (URB), the Doctrine, Organization, Training, Materiel, Leadership and Education, Personnel and Facilities (DOTMLPF) Working Group, and submitted to the Deputy Commandant for Combat Development and Integration (DC CD&I). *Id.* The DC CD&I presents the SJA to CMC’s uncompensated requests, along with all others from the annual URB to the Marine Requirements Oversight Council (MROC) for the Commandant’s decision. *Id.* If approved, the changes will be added to the following August Authorized Strength Report (ASR) with an effective date three fiscal years from the current fiscal year. *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* ¶ 59. of enclosure (1), at 8-9 (defining Occupational Field Managers as “The principal point of contact between the Commandant and the total force with regard to capabilities and force structure, intended structure

occupational field.¹⁵⁰ MOS Managers assist the SJA to CMC in these roles.¹⁵¹ Three MOS Managers are appointed within Judge Advocate Division (JAD) to manage each of the MOSs within the 44XX occupational field: 4402 - judge advocates; 4430 - legal administrative officers; and 4421 - legal service specialists.¹⁵² As the Occupational Field Manager and Functional Advocate, the SJA to CMC has a formal, integrated, and meaningful role in judge advocate structure, inventory, recruiting, education, training, and assignments, including:

- interaction with TFSD to effect changes to structure, through,
 - procedures for submission of, and provision of comments/concurrence/non-concurrence on all TOECRs affecting judge advocate structure;
 - participation in force structure Doctrine, Organization, Training, Materiel, Leadership and Education, Personnel and Facilities (DOTMLPF) assessments, solutions and working groups affecting judge advocate structure;
 - provision of Subject Matter Experts (SMEs) to force structure review boards and working groups, and to evaluate and determine legal skills necessary to accomplish a unit's prescribed Mission Essential Tasks (METs); and
 - sponsorship management of all assigned external billets.¹⁵³
- interaction with Training & Education Command (TECOM) to affect the MOS system and school opportunities. This includes request procedures and SME input with respect to,

changes, training, and unique operational considerations pertaining to a specific OccFld [sic]. OccFld managers are assigned purview over a grouping of Military Occupational Skills (MOS) and their respective MOS managers.”).

¹⁴⁹ The Functional Advocate “Serve[s] as the Commandant's primary point of contact for a specific Marine Corps function . . .[.]” including Legal. *Id.* ¶ 4.b. of enclosure (1), at 8-1.

¹⁵⁰ MCO 5311.1D, *supra* note 47, ¶ 8.a., at 25.

¹⁵¹ *Id.* ¶ 52. of enclosure (1), at 8-8 (defining MOS Managers as “The Commandant's subject matter expert on a specific MOS who advises the Commandant on derivation of capabilities and force structure; and who serves as a technical advisor to an Occupational Field (OccFld) manager by assisting in the classification, training, and career progression of personnel within an MOS. MOS Managers will be overseen by OccFld managers.”).

¹⁵² USMC SAP, *supra* note 42, at 2. The MOS Manager for 4402s is the Judge Advocate Division Support Branch (JAS) Branch Head, for 4421s, the Legal Chief of the Marine Corps, and for 4430s, the Legal Administrative Officer of the Marine Corps. *Id.* at 2 n.2.

¹⁵³ See MCO 5311.1D, *supra* note 47, ¶ 8.h., at 25.

- the establishment of additional Primary MOSs (PMOSs) or Necessary MOSs (NMOSs) within the 44XX occupational field;
 - changes to skills required for any MOS within the 44XX occupational field;
 - accompanying changes to formal school and training requirements; and
 - increase in the number of annual assignments to formal school.¹⁵⁴
- interaction with DC M&RA, Manpower Plans (MP) to affect the rate of accessions, promotions, and retention programs. This includes request procedures and SME inputs with respect to,
 - accession mission planning;
 - return to active duty boards;
 - debt subsidy pay;
 - career designation boards; and
 - promotion precepts.
 - interaction with DC M&RA, Manpower Management (MM) to effect assignments. The officer within DC M&RA (MM) responsible for annually preparing the proposed list – or “slate” – of officers to be assigned, and to which billet/unit, is referred to as an assignment “monitor.” Each monitor is responsible for several thousand officers, and therefore relies on the recommendations of the MOS Manager’s input. The monitor will, particularly in the case of judge advocates, give those recommendations great weight.¹⁵⁵

¹⁵⁴ See U.S. Marine Corps Order 1200.15C, *MOS System Modification Process*, ¶ 4.d., at 4 (11 Sep. 2009); see MCO 5311.1D, *supra* note 47, ¶ 2. of enclosure (1), at 7-2 to -3.

¹⁵⁵ Colonel (Col) John R. Ewers, USMC, Deputy Staff Judge Advocate to the Commandant of the Marine Corps, testified that the Deputy Commandant for Manpower and Reserve Affairs (DC M&RA) Manpower Management (MM) approved 100% of Judge Advocate Division’s (JAD’s) (4402 MOS Manager) recommended assignments for this past year. Transcript of October 13, 2010 Hearing, at 132, 145-46 [hereinafter Col Ewers Testimony]. Similarly, Senior Executive Service (SES) Michael F. Applegate, Director, Manpower Plans and Policy Division, Manpower and Reserve Affairs, Headquarters, Marine Corps, testified that this was consistent with historical trends, in which 98-99% of JAD’s recommended assignments are approved by M&RA (MM) and, ultimately, the Commandant of the Marine Corps. Transcript of October 13, 2010 Hearing, at 156-57 [hereinafter SES Applegate Testimony]. He also testified that, in those one or two rare cases over the years where there may have been disagreement, it was generally with respect to O-6 level assignments, in which case the controversy would typically be resolved at the general officer level. *Id.* at 154-56.

- interaction with MCRC to affect the quality and flow of accessions.

Figure A, below, illustrates the Marine Corps manpower system.

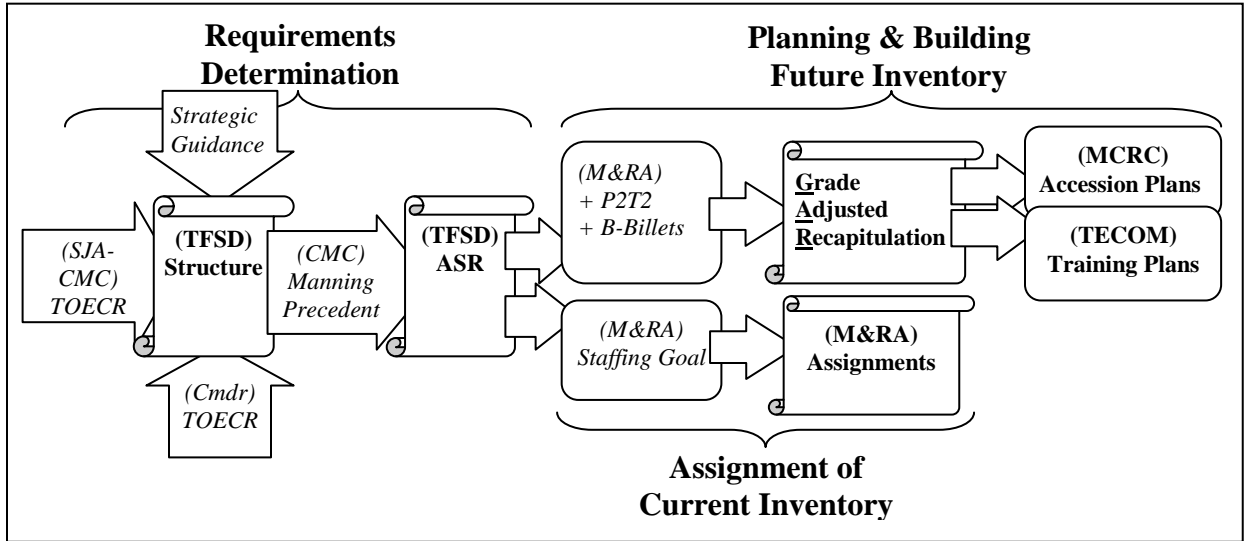


Figure A. Marine Corps Manpower System

III. Determining the Number of Judge Advocates Required to Fulfill the Legal Mission of the Department of the Navy

A. No Single Standard

There is no uniform standard within the Department of Defense (DoD) for determining the number of judge advocates required within the Military Departments or Services, nor is there a single standard for determining the number of judge advocates required within the Department of the Navy (DON). The Services and their parent Departments have different approaches to determining force structure, which reflect their different roles and missions, cultures, history, organization, and resources.¹⁵⁶

That being said, the Panel also recognizes that there is a level of commonality in the practice of law by judge advocates across the Services, and a level of commonality in the organization of the three Judge Advocates General's (JAG) Corps. For those reasons, the Panel believes it useful to benchmark the number of judge advocates in the Army, Air Force, Navy, and Marine Corps. As illustrated in Table 8, below, (which contains the same data as Table 2, in Section I.D., *supra*), the judge advocate communities in the Navy and Marine Corps are

¹⁵⁶ See Independent Review Panel to Study the Relationships Between Military Department General Counsels and Judge Advocates General, *Legal Services in the Department of Defense, Advancing Productive Relationships, Report of the Independent Review Panel* (Sep. 15, 2005). Although there is no uniform Department of Defense standard for determining judge advocate requirements, DoD does publish broad guidelines for the determination of military manpower requirements writ large, including a guiding principle that "National military objectives shall be accomplished with a minimum of manpower that is organized and employed to provide maximum effectiveness and combat power." U.S. Dep't of Defense, Dir. 1100.4, *Guidance for Manpower Management*, ¶ 3.1., at 2 (Feb. 12, 2005).

Additional standing policies include:

- (1) manpower requirements are driven by workload and shall be established at the minimum levels necessary to accomplish mission and performance objectives;
- (2) assigned missions shall be accomplished using the least costly mix of personnel (military, civilian, and contract) consistent with military requirements and other needs of the Department as prescribed by law;
- (3) military and civilian manpower resources shall be programmed in accordance with validated manpower requirements, and within fiscal limits and acceptable levels of risk identified in Defense planning and programming guidance; and
- (4) military and civilian manpower resources shall be allocated to maintain ready forces and accomplish defense missions in priority order, and commensurate with available resources and Congressional constraints. *Id.* ¶¶ 3.2., 3.2.3., 3.3.1., 3.3.2., at 2-3, 5.

significantly smaller than those of the Air Force and Army, whether measured in total numbers, computed as a ratio to active-duty end-strength, or compared by flag/general officer positions.

	Army	Air Force	Navy	Marines
Service End-strength	566,045	334,196	328,303	202,441
Total Active-Duty Judge Advocates (x) to End-strength	(1,828) 1 to 310	(1,225) 1 to 273	(811) 1 to 405	(435) 1 to 465
Total full-time attorneys (x) to End-strength ¹	(3,193) 1 to 177	(1,688) 1 to 198	(1,515) ² 1 to 216	(502) 1 to 403
			DON total (2,017) 1 to 263	
Reserve Component Judge Advocates (x) to Active-Duty End-strength ³	(1,522) 1 to 372	(671) 1 to 498	(441) 1 to 744	(331) 1 to 612
Active-Duty Judge Advocate Flag/General Officers (x) to Active-Duty Judge Advocate End-strength	(5) 1 to 366	(6) 1 to 204	(2) 1 to 406	(1) 1 to 435
Chart accurate as of September 30, 2010. ¹ Includes active-duty judge advocates and civilians working for JAG, SJA to CMC, and OGC. ² USN total of 1,515 includes all OGC attorneys not assigned to the USMC. ³ Does not include the National Guard. Reserve attorneys in the Navy and Marine Corps are organized to support the active component.				

Table 8. Ratios of active component judge advocates to military Service end-strength, full-time attorneys to military Service end-strength, reserve component judge advocates to military Service end-strength, and active-duty flag/general officers to active-duty judge advocate end-strength as of September 30, 2010

Even when adjusting to account for full-time civilian attorneys, it is clear that the DON has fewer attorneys (civilian and military) per active-duty end-strength, than either the Department of the Army or the Department of the Air Force. Taking the comparison a step further, as illustrated below in Figure B, one can calculate what the legal community within the DON would look like if it were similar to the legal communities in the Departments of the Army and Air Force.

Example 1. If the Department of the Navy looked like the Department of the Army, with regard to the ratio of full-time attorneys to active-duty end-strength (1 to 177), the Department of the Navy would have **2,999** Navy and Marine judge advocates and full-time civilian attorneys.

Using the existing 811/435/771 ratio of Navy judge advocates/Marine judge advocates/full-time civilian attorneys, it would further break down into:

1,205 Navy judge advocates
646 Marine judge advocates
1,148 Civilian attorneys

Example 2. If the Department of the Navy looked like the Department of the Air Force, with regard to the ratio of full-time attorneys to end-strength (1 to 198), the Department of the Navy would have **2,681** Navy and Marine judge advocates and full-time civilian attorneys, further broken down to:

1,077 Navy judge advocates
578 Marine judge advocates
1,026 Civilian attorneys

Figure B. Examples of the DON legal community as if it were commensurate with the legal communities in the Departments of the Army and Air Force

The Panel cautions that there are limits to the utility of such benchmarking, as the roles and missions of the legal communities across the Military Departments are not identical. But even with that caveat, the above comparison is useful in the view of the Panel in that the size of the legal communities in the Departments of the Army and Air Force can represent an outer boundary or high end in force structure analysis.

B. Review of Operational Law Requirements

The Panel was directed to review the emergent¹⁵⁷ operational law requirements for the U.S. Navy and Marine Corps, including requirements for judge advocates in Joint Task Forces (JTFs), in support of rule of law objectives in Iraq and Afghanistan, and in operational units.

As part of its review, the Panel received the testimony of senior U.S. Navy and Marine Corps commanders and staff judge advocates;¹⁵⁸ interviewed senior commanders in Afghanistan,

¹⁵⁷ Emergent can mean coming into existence or occurring unexpectedly. <http://www.merriam-webster.com/>. Since it is not self evident which meaning Congress intended to apply, the Panel will discuss both permanent operational law requirements that have developed since September 11, 2001, and those that occurred unexpectedly, as a result of contingency operations, with a focus on Operation Iraqi Freedom and Operation Enduring Freedom.

For a discussion of the development of operational law requirements before September 11, 2001, with a focus on the Marine Corps, the Panel recommends: Frederic L. Borch, *Judge Advocates in Combat: Army Lawyers in Military Operations from Vietnam to Haiti*, Office of the Judge Advocate General and Center of Military History, U.S. Army, *passim* (2001); Col Raymond E. Ruhlmann III, USMCR, *Legal Services Support to Operational Commanders: A Summary of Observations and Lessons from OEF/OIF Judge Advocates and Infantry Commanders*, Marine Corps Gazette, Nov. 2006, at 79-81; Lieutenant Colonel (LtCol) Walter G. Sharp, USMC, *The Warfighting Role of the Marine Judge Advocate*, Marine Corps Gazette, Feb. 1996, at 18; *Final Report to Congress: Conduct of the Persian Gulf War*, 605-32 (Apr. 1992) [hereinafter *Conduct of the Persian Gulf War*]; LtCol Gary D. Solis, USMC (Ret.), *Marines and Military Law in Vietnam: Trial by Fire* (History and Museums Division, Headquarters, Marine Corps 1989).

In summary, those authors point out that in WWII, Korea, and Vietnam, legal requirements were largely limited to the core functions of military justice and legal assistance. However, lessons learned from those conflicts led to Departmental and Service regulations requiring judge advocates to become more involved in operational planning, training and execution, in order to prevent law of war violations during the conduct of operations. For example, they required judge advocates to: (1) advise the commander on Law of Armed Conflict (LOAC) issues, (2) review operational plans for compliance with LOAC, and (3) provide LOAC training to operational forces. These requirements increased during the 1990s, beginning with the Gulf War, which expanded judge advocate involvement in the areas of claims, fiscal law, and contracting; as well as LOAC considerations of targeting, requisitions of private property, enemy prisoners of war, detainees, repatriation, and cessation of hostilities. Following the Gulf War, the U.S. military responded to contingencies involving low-intensity, asymmetric warfare; failed or weak states; and complex international legal authorities and mandates, which create legally intensive operating environments for the commander. The lessons learned from these operations reinforced the trend for increasing the involvement of judge advocates in operational planning, training, and execution identified in the Gulf War. The importance of operational law was noted by then-Lieutenant General Anthony Zinni, while serving as Commander, U.S. Central Command in 1996. He stated,

Operational Law is going to become as significant to the commander as maneuver, as fire support, and as logistics. It will be a principal battlefield activity. The senior staff judge advocates may be as close to the commander as his operations officer or his chief of staff. They will be the right hand of the commander, and he will come to them for advice.

JP 1-04, *supra* note 105, at III-1.

including General (GEN) David H. Petraeus, USA, Commander, NATO International Security Assistance Force and Commander, U.S. Forces Afghanistan, and VADM Robert S. Harward, USN, Commander, Joint Interagency Task Force 435, Afghanistan; analyzed manpower data provided by the U.S. Navy and Marine Corps; and considered documents addressing the future direction of U.S. defense strategy and doctrine.

1. Overview

Since September 11, 2001, the operational law requirements of the U.S. Navy and Marine Corps have increased significantly, to include demand for judge advocates on JTFs, in support of rule of law objectives in Iraq and Afghanistan, and in other operational units.

- Since 2001, the number of permanent operational law assignments for U.S. Navy judge advocates has risen from 130 to 223, an increase of 75%. In addition, as of September 30, 2010, 584 U.S. Navy judge advocates have served in Individual Augmentee (IA) assignments, ranging from 7 to 15 months in duration, the majority of which (387) were “boots on the ground” tours in Iraq or Afghanistan. In total, 40% of U.S. Navy judge advocates serve in operational law assignments today. In 2001, less than 18% served in operational assignments.
- Since 2001, the number of permanent operational law assignments for Marine judge advocates has risen from 20 to 47, an increase of 135%. In addition, since September 11, 2001, 391 active component and 108 reserve component Marine judge advocates have deployed with Marine units in support of Operation Iraqi Freedom (OIF) or Operation Enduring Freedom (OEF), and another 80 active component and 28 reserve component judge advocates have deployed as IAs in support of OIF or OEF. This number of OIF and OEF deployments reflects decisions by senior battlefield commanders to increase the number of judge advocates in the command elements (i.e. headquarters) of Marine

¹⁵⁸ The senior commanders included Lieutenant General (LtGen) John Kelly, USMC (former Assistant 1st Marine Division Commander in 2003, I MEF Commander in 2008, and currently Commander, MARFORRES) and LtGen Richard Natonski, USMC (Ret.) (former Commander, Task Force Tarawa in 2003, Commanding General, 1st Marine Division in 2004, and Commander, Marine Forces Command in 2009). Senior judge advocates included Colonel Kevan F. Jacobson, JAGC, USA, Director, Law Center, The Judge Advocate General’s Legal Center and School (TJAGLCS); Captain (CAPT) Stacy A. Pedrozo, JAGC, USN, U.S. Navy Military Fellow, Council on Foreign Relations; Col John R. Ewers, USMC, Deputy SJA to CMC.

Expeditionary Forces (MEF) and to assign judge advocates to the MEF's subordinate regimental combat teams and maneuver battalions.

- The enduring operational law requirements for the U.S. Navy and Marine Corps will continue to grow, notwithstanding the projected redeployment of forces from Iraq and eventual redeployment of forces from Afghanistan. Senior line commanders and judge advocates informed the Panel that the operational environment has become increasingly complex and legally intensive, and shows no signs of abating. The Panel agrees with their assessment based on its independent review of the *Quadrennial Defense Review* and other key national security strategy documents.
- The Panel believes that, as operational law requirements continue to grow, particularly within Joint commands, it will become increasingly important for U.S. Navy and Marine judge advocates to serve in those commands, including in senior billets. Both Services should ensure that their judge advocates receive Joint Professional Military Education (JPME) and that there are deliberate and robust manpower processes to nominate highly qualified judge advocates for service in Joint legal billets.
- The Panel observes that the role of the judge advocate in the U.S. Armed Forces may be undergoing a transformation. GEN Petraeus and other senior flag and general officers provided numerous examples of judge advocates executing duties outside the “legal lane.” The Panel respects that there are differences in Service culture concerning the use of judge advocates, but believes it is worth highlighting that commanders recognize that the skill sets inherent in experienced operational judge advocates can be successfully applied to non-legal tasks – particularly counterinsurgency operations and maritime operations.

2. What is Operational Law?

The DoD does not have a doctrinal definition of operational law.¹⁵⁹ The Marine Corps defines operational law as: “that body of international, foreign (host nation), and United States

¹⁵⁹ The sea Services (Navy, Marine Corps, and Coast Guard) publish a Commander's Handbook on the Law of Naval Operations and an Annotated Supplement that is “designed to provide officers in command and their staffs with an overview of the rules of law governing naval operations in peacetime and during armed conflict.” Office of the Chief of Naval Operations, *The Commander's Handbook on the Law of Naval Operations*, 3 (NWP 1-14M) (Jul. 2007)

domestic laws, regulations, and policies that directly affect United States military operations across the operational spectrum – from peacetime activities to combat operations.”¹⁶⁰

The Panel finds that definition of operational law useful for the purposes of this study. The Panel further recognizes that operational law refers to the range of legal and (related) policy issues directly affecting the planning, training, and execution of military operations. The JAG testified that operational law includes the following specialized practice areas: law of armed conflict, rules of engagement, law of the sea, international agreements, counter-terrorism, rule of law, operational environmental law, information operations/cyber law, intelligence oversight, Humanitarian Assistance/Disaster Relief (HA/DR), military commissions, international criminal tribunals, detention operations, foreign military assistance and training, counter-narcotics, ocean policy affairs, defense support to civil authorities, counter-piracy, counter-proliferation, and ballistic missile defense.¹⁶¹ Other witnesses noted that operational law also includes legal issues relating to foreign claims, foreign criminal jurisdiction, fiscal law, contracting, human trafficking, sovereign immunity, international organizations, civil affairs, command relationships, joint matters, and legal issues unique to certain geographic areas like the Arctic or the South China Sea.¹⁶²

The art of operational law is to identify legal and related policy issues in these divergent areas, and rapidly synthesize them in order to give timely and coherent legal advice to senior civilians, commanders, staffs, and tactical forces. The ultimate goal is to ensure U.S. forces can

[hereinafter *NWP 1-14M*]; see also U.S. Naval War College, *Annotated Supplement to the Commander's Handbook on the Law of Naval Operations* (15 Nov. 1997). The Handbook does not provide a stand-alone definition of operational law. See *NWP 1-14M*, *supra*.

¹⁶⁰ U.S. Marine Corps Order 3300.4, *Marine Corps Law of War Program*, ¶ 2. of enclosure (1), at 1 (20 Oct. 2003).

¹⁶¹ VADM Houck Testimony, *supra* note 107, at 127-60; VADM Houck Presentation, *supra* note 4, at 45-57 (1 Sep. 2010). Note that VADM Houck's list was illustrative, not exhaustive.

¹⁶² See VADM Harris, Jr. Testimony, *supra* note 111, at 11-14; see VADM Bird Testimony, *supra* note 111, at 20-26; see CAPT Stacy A. Pedrozo, JAGC, USN, U.S. Navy Military Fellow, Council on Foreign Relations, Transcript of October 13, 2010 Hearing, at 84-107 [hereinafter CAPT Pedrozo Testimony]; see Independent Review Panel to Study the Judge Advocate Requirements of the Department of the Navy Memorandum, *Subj: Summary of Preparatory Meeting of October 19, 2010*, enclosure (1) (27 Oct. 10) [hereinafter GEN Petraeus VTC Summary] (summarizing preparatory video teleconference (VTC) meeting of the Panel with GEN David H. Petraeus, USA, Commander, NATO International Security Assistance Force and Commander, U.S. Forces Afghanistan); see Independent Review Panel to Study the Judge Advocate Requirements of the Department of the Navy Memorandum, *Subj: Summary of Preparatory Meeting of October 13, 2010*, enclosure (1) (18 Oct. 2010) [hereinafter VADM Harward VTC Summary] (summarizing preparatory VTC meeting of the Panel with VADM Robert S. Harward, USN, Commander, Combined Joint Interagency Task Force 435).

maintain readiness, ensure freedom of navigation, and conduct operations in accordance with applicable laws, regulations, and policies.¹⁶³

It would be an oversimplification to conclude that all law practiced at an operational command or staff is operational law. Similarly, not all practice areas that could be described as operational are exclusively so. The practice of law at operational commands and staffs also includes traditional legal assistance, administrative law, and military justice.¹⁶⁴ Few judge advocates are permanently assigned to commands at which they practice operational law exclusively.¹⁶⁵ However, many permanent assignments, or billets,¹⁶⁶ may be properly viewed or categorized as operational law billets based on the fact that a significant portion of the duties involve the practice of operational law.¹⁶⁷ For example, judge advocate assignments to standing JTFs, combatant commands, subordinate service component commands, and many operational units within the U.S. Navy and Marine Corps, are generally classified as operational law assignments. Judge advocates are assigned to these commands primarily as Staff Judge Advocates (SJAs) or members of their staff. The SJA and respective staff provide operational

¹⁶³ See SJA to CMC Submission, *supra* note 38, at 15.

¹⁶⁴ See, e.g., VADM Houck Testimony, *supra* note 107, at 130-31; VADM Harris, Jr. Testimony, *supra* note 111, at 9. See generally Neil Carey et al., Center for Naval Analyses, *An Analysis of Navy JAG Corps Future Manpower Requirements, Part 2: OJAG, Embedded SJAs, NJS, and Reservists* (Apr. 2008) [hereinafter CNA Manpower Study, Part 2] (concluding that approximately 20% of an operational SJA's time is spent on military justice matters).

¹⁶⁵ Permanent assignments to practice exclusively operational law include, but are not limited to, positions within the Office of Legal Counsel to the Chairman, Joint Chiefs of Staff; positions within Code 10, Office of the Judge Advocate General, and International and Operational Law Branch (JAO), Judge Advocate Division (JAD); specific positions in combatant commander staffs; and certain positions at the Naval War College, the Marine Corps University, Naval Justice School, and The Judge Advocate General's Legal Center and School (TJAGLCS).

¹⁶⁶ The term "billet" is synonymous with the term "assignment." They both are used to denote the nature of the duties involved in a particular position within an organization. "Assignment" is generally used when speaking in the context of a particular officer, or group of officers (e.g., a judge advocate's future assignments will be determined by a variety of factors). "Billet" is generally used when speaking in the context of an organization's structure (e.g., the 1st Marine Division has two billets which are required to be filled by judge advocates).

¹⁶⁷ VADM Houck Testimony, *supra* note 107, at 130-31. In explaining that the U.S. Navy had 297 operational law billets as of August 2010 (including Office of Military Commissions (OMC) and Individual Augmentations (IAs)), the JAG stated,

[S]ome billets do a mix of different things. So we make certain judgment calls in calling a billet an operational law billet as opposed to something else. What it does not include is the more traditional SJA advice. So if you are at a Navy region, you're doing important command advice work; or if you're in a Navy hospital; or if you're in the Bureau of Naval Personnel, you're doing command advice work there.

Id.

law support in their role as command advisors, including membership on operational planning teams, boards, and cells and service as watch officers within combat operations centers.¹⁶⁸

As noted in Section II, *supra*, judge advocates may also be temporarily assigned to operational law duties at contingency JTFs or combatant commands through the Individual Augmentation/Augmentee (IA) process or a specific Request for Forces (RFF).¹⁶⁹ Judge Advocates may also be temporarily assigned to augment U.S. Navy or Marine contingency task forces.

3. Operational Law Requirements: U.S. Navy Judge Advocates¹⁷⁰

The JAG advised the Panel that operational law billets fall into five categories for U.S. Navy judge advocates: permanent assignments afloat, permanent assignments at Joint commands, permanent assignments in U.S. Navy commands and staffs, IAs, and Office of Military Commissions (OMC).¹⁷¹ Figure C, below, depicts the increase in permanent operational law billets since September 11, 2001.

¹⁶⁸ See generally JP 1-04, *supra* note 105 (providing doctrine for the planning, training, and execution of legal support to joint military operations).

¹⁶⁹ See CJCSI 1301.01C, *supra* note 99, ¶ 5., at 2 (defining Individual Augmentation/Augmentee (IA) as “an unfunded temporary duty position (or member filling an unfunded temporary duty position)” identified on a Joint Manning Document (JMD) by a supported Combatant Commander (COCOM) to augment staff operations during contingencies.). IAs include positions at permanent organizations required to satisfy a “heightened” mission in direct support of contingency operations. *Id.* Either active or reserve component personnel may fill IA positions. CJCSI 1301.01C, *supra* note 99, ¶ 5., at 2; OPNAVINST 1001.24, *supra* note 99, ¶ 3.a.-c., at 2; see MCO 1001.61, *supra* note 143, ¶ 2.d., at 2, ¶ 4.f., at 4, ¶ 9., at 10.

¹⁷⁰ This section is limited to a discussion of the operational law requirements for U.S. Navy judge advocates. The subsequent section will discuss requirements for Marine judge advocates.

¹⁷¹ VADM Houck Testimony, *supra* note 107, at 131. “Permanent” assignments refer to assignments to which judge advocates receive “permanent change of station” orders; permanent assignments are distinct from temporary assignments, such as individual augmentees. For purposes of this report, the numbers cited for “permanent” operational law assignments refer to the number of judge advocates actually assigned under permanent change of station orders to established billets. In other words, the numbers cited refer to billets actually filled by bodies. Permanent operational law billets do not include billets at the Office of Military Commissions (OMC) for purposes of this report. OMC billets were originally filled as IA assignments and later were converted by the Office of the Secretary of Defense to PCS assignments. For purposes of this report they are discussed separately in Section III.C., *infra*.

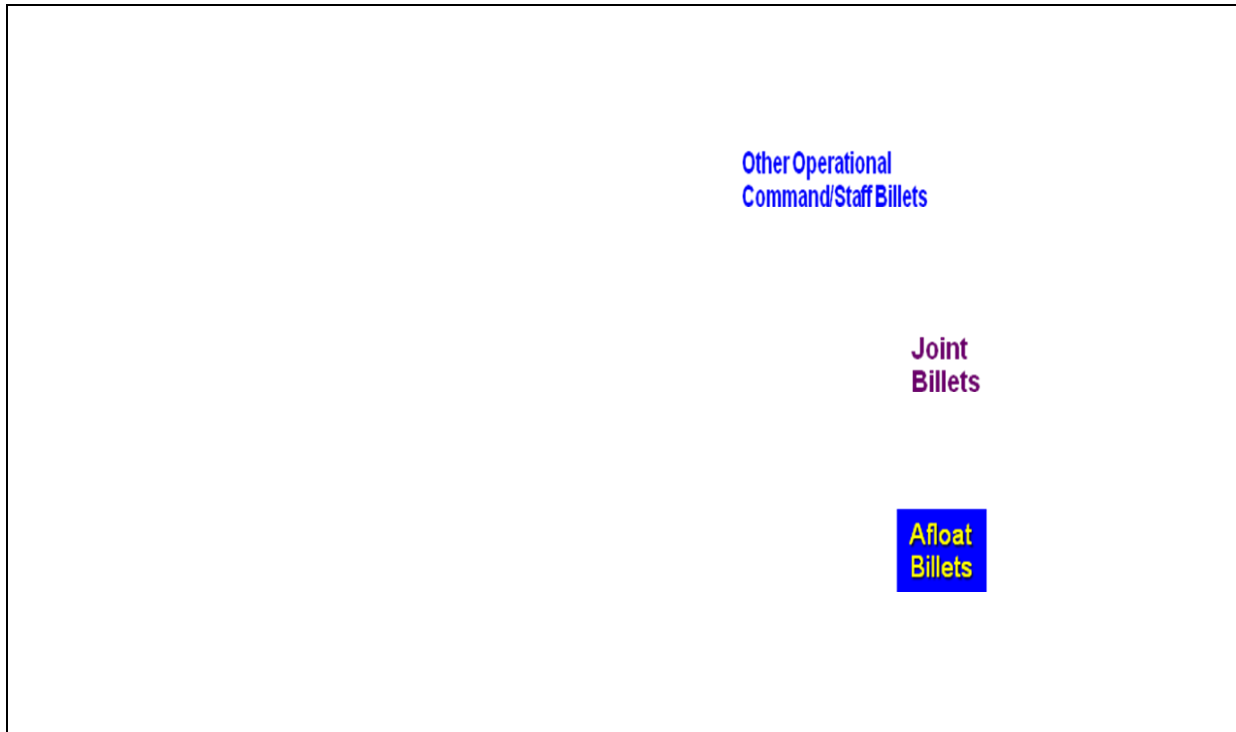


Figure C. Depicts the increase in permanent (not including IAs or OMC) U.S. Navy operational law billets since September 11, 2001

As indicated, despite a reduction in the number of permanent assignments for judge advocates afloat, the total number of permanent operational law assignments has increased significantly since September 11, 2001. This increase is attributed to rapid growth in Joint billets and U.S. Navy operational command and staff billets.

With regard to permanent assignments at Joint commands and staffs, which have grown from 29 to 56 billets, the JAG noted that U.S. Navy judge advocates currently serve as Legal Counsel to the Chairman of the Joint Chiefs of Staff and as the senior SJAs to several combatant commanders, and in the recent past have served as the senior SJAs at all of the geographic combatant commands, and at Joint Forces Command and U.S. Strategic Command.¹⁷² In addition, U.S. Navy judge advocates serve in all of the combatant commander staffs, the Defense Intelligence Agency, National Security Agency, the Defense Institute of International Legal

¹⁷² Judge Advocate General Memorandum, *Subj: Marine Corps Legal Services Strategic Action Plan 2010-2015*, at 4-5 (Ser 00/0098) (31 Aug. 2010) [hereinafter VADM Houck Memorandum (Ser 00/0098)].

Studies, the Marshall Center, the Asia-Pacific Center, the Office of the Secretary of Defense, the State Department, and the White House.¹⁷³

Furthermore, the Panel received testimony that the growth from 42 to 126 billets at U.S. Navy operational commands and staffs was due to a combination of factors, including, but not limited to: the U.S. Navy's investment in establishing Maritime Operations Centers (MOCs) and Maritime Headquarters at U.S. Navy component commands and numbered Fleets;¹⁷⁴ a rapidly growing demand for judge advocates in Special Warfare commands;¹⁷⁵ the establishment of the U.S. Tenth Fleet and a rapidly growing demand for legal support in the cyber domain;¹⁷⁶ new demands for judge advocate support in the U.S. Africa Command area of responsibility;¹⁷⁷ expanding demands for judge advocates to support combatant commanders with responsibilities in the Arctic and western Pacific;¹⁷⁸ the formal adoption of HA/DR as a core competency for the sea Services;¹⁷⁹ the practice of "lawfare" by foreign States;¹⁸⁰ the expansion of rule of law

¹⁷³ See VADM James W. Houck, Judge Advocate General of the Navy, Response to Panel Members' Request for Information #12 of Aug. 20, 2010 (providing a spreadsheet of PCS billets filled by U.S. Navy judge advocates outside the DON in FY 10).

¹⁷⁴ See CAPT Pedrozo Testimony, *supra* note 162, at 85-87, 93-94.

¹⁷⁵ VADM Houck Letter (Ser 00/0102), *supra* note 94, enclosure (6); VADM Harward VTC Summary, *supra* note 162, at 2.

¹⁷⁶ VADM Houck Testimony, *supra* note 107, at 148-49; CAPT Pedrozo Testimony, *supra* note 162, at 90-91; VADM Houck Presentation, *supra* note 4, at 54. Tenth Fleet was reactivated January 29, 2010 as U.S. Fleet Cyber Command/U.S. Tenth Fleet. As Fleet Cyber Command, it is the Naval component to U.S. Cyber Command. As U.S. Tenth Fleet, the command provides operational support to Navy commanders worldwide, supporting information, computer, electronic warfare and space operations.

¹⁷⁷ VADM Harris, Jr. Testimony, *supra* note 111, at 11-13.

¹⁷⁸ CAPT Pedrozo Testimony, *supra* note 162, at 88-90, 101-02; *see also* VADM Bird Testimony, *supra* note 111, at 26-27.

¹⁷⁹ CAPT Pedrozo Testimony, *supra* note 162, at 88-90.

¹⁸⁰ VADM Houck Testimony, *supra* note 107, at 147-48; VADM Bird Testimony, *supra* note 111, at 21-24; CAPT Pedrozo Testimony, *supra* note 162, at 94-97. Although the Panel received testimony describing the practice of "lawfare," the Panel urges caution regarding that term, as it is the Panel's view that the term is subject to misuse.

The Panel notes that the strategic concept of incorporating "legal warfare" into military strategy has a special meaning for the People's Republic of China (PRC). In an influential 1999 text entitled "*Unrestricted Warfare*," Qiao Liang and Wang Xiangsui introduced the concept of "international law warfare" as an example of "means and methods used to fight a non-military war." Qiao Liang & Wang Xiangsui, *Unrestricted Warfare*, Ch. 2 (Beijing, PLA Literature and Arts Publishing House) (1999), available at www.opensource.gov. The Open Source Center (OSC) is the U.S. Government's premier provider of foreign open source intelligence. OpenSource.gov provides information on foreign political, military, economic, and technical issues beyond the usual media from an ever-expanding universe of open sources.

In 2003, the Communist Party Central Committee approved the strategic concept of "Three Warfares," a People's Liberation Army information warfare concept aimed at influencing the psychological dimensions of military

operations in the maritime domain, most notably in the areas of counter-piracy and counter-proliferation;¹⁸¹ and rapidly growing demand for judge advocates with expertise in operational environmental law.¹⁸² The final topic was highlighted by U.S. Navy senior line admirals, the JAG, and senior U.S. Navy SJAs as a practice area of growing importance, as environmental regulation and litigation poses a high risk to fleet readiness and the global mobility of U.S. Armed Forces.¹⁸³

activity. U.S. Dep't of Defense, Office of the Sec'y of Defense, *Annual Report to Congress: Military and Security Developments Involving the People's Republic of China*, 22, 26 (2010) (discussing China's military strategy, including "legal warfare"). The "Three Warfares" include: psychological warfare, media warfare, and legal warfare, the latter of which is defined as uses of international and domestic laws to gain international support and manage possible political repercussions of China's military actions. *Id.* at 26. In its 2010 report on military and security developments involving the PRC, the U.S. Department of Defense stated the following regarding PRC "Legal Warfare":

The concept of the "Three Warfares" is being developed for use in conjunction with other military and non-military operations. For example, China has incorporated the concept of Legal Warfare into its attempts to shape international opinion and interpretation of international law. An overwhelming majority of nations throughout the world, including the United States, believe that customary international law, as reflected in the UN Convention on the Law of the Sea (UNCLOS), effectively balances resource-related sovereign rights of littoral states in their EEZ with the freedoms of navigation and overflight and other internationally lawful uses of the sea of other nations. This majority view is based upon a sound reading of the negotiating history of UNCLOS, the actual text of UNCLOS itself, and decades of state practice. The PRC, however, appears to be making concerted efforts, through enacting domestic legislation inconsistent with international law, misreading the negotiations and text of UNCLOS, and overlooking decades of state practice in attempts to justify a minority interpretation providing greater authority by littoral states over activities within the EEZ.

Id.

The distinguishing features of the above-described PRC "Legal Warfare" – in contrast to most states' interpretation and application of law in the ordinary course of their international relations – are that the Chinese have expressly characterized the use of law as a form of unconventional warfare and they have formally incorporated such "Legal Warfare" as an element of military strategy.

For a more traditional definition of "lawfare," which again, the Panel does not endorse, see also Charles J. Dunlap, *Lawfare: A Decisive Element of 21st-Century Conflicts?*, 54 JFQ 34 (3d Quarter, Jul. 2009).

¹⁸¹ VADM Houck Presentation, *supra* note 4, at 53 ("We must lead in the creation of international norms and standards that can help advance the common good and expand the rule of law in these domains of growing importance." (quoting Michèle Flournoy & Shawn Brimley, *The Contested Commons*, Proceedings, Volume 135/7/1,277, Jul. 2009)).

¹⁸² VADM Houck Testimony, *supra* note 107, at 149-50; VADM Bird Testimony, *supra* note 111, at 24-27; CAPT Pedrozo Testimony, *supra* note 162, at 102-04; VADM Houck Presentation, *supra* note 4, at 55.

¹⁸³ *E.g.*, VADM Houck Testimony, *supra* note 107, at 149-50; VADM Bird Testimony, *supra* note 111, at 24-27; CAPT Pedrozo Testimony, *supra* note 162, at 102-04; VADM Houck Presentation, *supra* note 4, at 55.

The U.S. Navy judge advocate community has also filled a significant number of Individual Augmentation (IA) requirements, beginning in FY 03. Figure D, below, shows the total number of active component (AC) and reserve component (RC) judge advocates who have served in IA deployments, by fiscal year. A majority (387) of U.S. Navy judge advocate IAs have served “boots on the ground” tours in Iraq or Afghanistan of 7 to 15 months duration.

Figure D. Total number of (AC & RC) U.S. Navy judge advocates who have served as IAs.

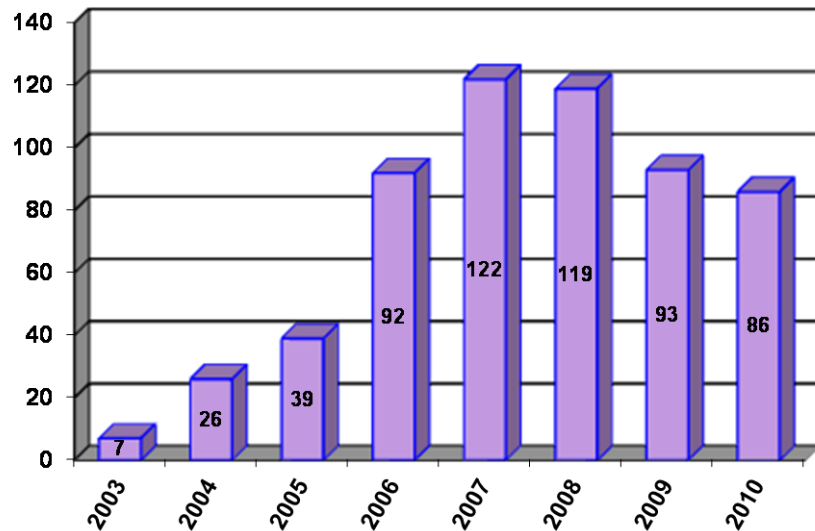


Table 9, below, illustrates the breakdown of current (December 2010) IA billet requirements to be filled by AC and RC U.S. Navy judge advocates. It is important to note that annually, it takes 70 active-duty officers to sustain the 56 AC billets due to training pipeline and personnel tempo (leave) requirements that must be added to the defined “boots on the ground” requirement. It is also important to note that the IA requirements in Afghanistan and Pakistan are growing. For example, on September 1, 2010, when the JAG testified to the Panel, there were no billet requirements in Pakistan and the Afghanistan billet requirement was 22. There are now 3 billet requirements in Pakistan and the billet requirements for Afghanistan have risen to 32.¹⁸⁴

¹⁸⁴ See VADM Houck Presentation, *supra* note 4, at 50.

IA Requirement	AC/RC
Afghanistan	32/0
Iraq	13/4
Kuwait	0/1
Horn of Africa	2/0
Guantanamo Bay	2/2
Qatar	1/0
U.S. Central Command	1/0
Bahrain	1/0
Pakistan	3/0
Criminal Investigation Task Force	1/4
Other	0/20
Total IA Billets	56/30
Total IA Billets (+Sustainment)	70/35

Table 9. IA billet requirements to be filled by AC and RC U.S. Navy judge advocates.

Individual Augmentee duties can be quite diverse, including traditional operational law duties in rules of engagement, targeting, and the law of armed conflict, as well as detention operations, training foreign militaries in the requirements for military justice and human rights, establishing judicial and police capabilities in local communities and national governments, and investigating transnational crimes, to name a few.¹⁸⁵

The Panel closes its discussion of operational law requirements within the U.S. Navy by highlighting two comments that were made to the Panel by senior commanders, beginning with VADM John M. Bird, USN, Director, Navy Staff. VADM Bird stated,

¹⁸⁵ VADM Houck Presentation, *supra* note 4, at 51; *see also* VADM Houck Testimony, *supra* note 107, at 142-43.

I think law and legal advice permeates all phases of operations. As we say, from phase zero in peacetime to completion of wartime operations or phase five, so it's critical in both peace and war. I would say that the phase zero, phase one [—] the peacetime can be most critical, and if done right, will adequately prevent war. That's true across the range, but particularly on legal advice.

The United States Navy has a cooperative strategy, a maritime strategy, that we sign in concert with the Coast Guard and the Marine Corps. In there we list six strategic imperatives and six core competencies. Legal advice is critical in each and every one of those imperatives, and each and every one of those core competences, without a doubt.¹⁸⁶

Similarly, VADM Harry B. Harris, Jr., USN, Commander, U.S. Sixth Fleet, stated, "I consult with [judge advocates] on any and every significant issue that I face. . . Every operational commander I know wants all the judge advocates he or she can get."¹⁸⁷

4. Operational Law Requirements: Marine Judge Advocates

a) Historic and Evolving Requirements

Within the Marine Corps the enduring requirement for operational law advice and services has been, and continues to be, filled primarily by the SJA permanently assigned to the Marine service component commands (e.g., Marine Forces Europe, South, Central, etc.) and command elements of the Marine Air-Ground Task Forces (MAGTFs).¹⁸⁸ Additionally, there are structured requirements for Marine judge advocates to be permanently assigned to operational law billets at service headquarters,¹⁸⁹ Office of the Judge Advocate General (OJAG),¹⁹⁰ Joint Staff,¹⁹¹ and training commands.¹⁹² Marine judge advocates also compete for

¹⁸⁶ VADM Bird Testimony, *supra* note 111, at 20-21.

¹⁸⁷ VADM Harris, Jr. Testimony, *supra* note 111, at 9-10.

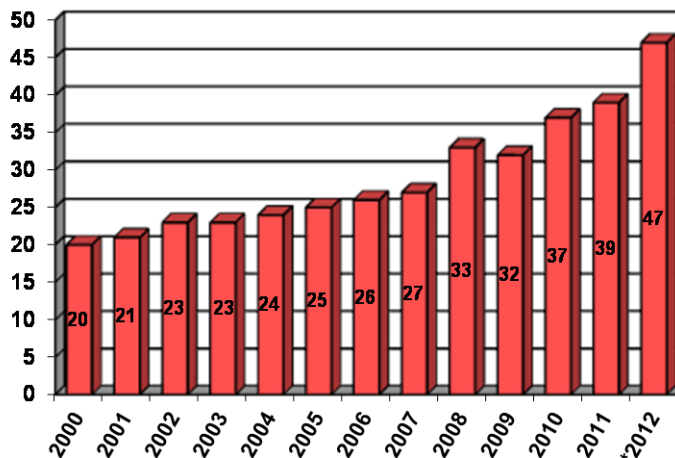
¹⁸⁸ See MCDP 3, *supra* note 37, at 69-73. The Marine Air-Ground Task Force (MAGTF) is the Marine Corps' principle organization for all missions across the range of military operations. MAGTFs are general purpose forces of combined arms that can be tailored (task-organized) to the requirements of a specific situation. *Id.* Regardless of size or mission, each MAGTF has four core elements: a command element (i.e., headquarters), ground combat element (e.g., units of infantry, artillery, or tanks), aviation combat element, and logistics support element. *Id.* at 70-71. The command element provides the command and control for planning and executing all military operations, and as such serves as the headquarters. *Id.* There are both standing MAGTFs (e.g., Marine Expeditionary Units (MEU) and Marine Expeditionary Forces (MEFs)) and mission-specific, contingency MAGTFs (e.g., Marine Expeditionary Brigade – Afghanistan (MEB-A)). See *id.* at 73-76. There are three standing MEFs (I, II, and III MEF), *id.* at 73, 75-76, and seven standing MEUs (11, 13, 15, 22, 24, 26, and 31st MEU), U.S. Marine Corps, *Concepts & Programs*, 33, 37, 262 (2010).

¹⁸⁹ E.g., Branch Head, Operational & International Law Branch (Code JAO), Judge Advocate Division (JAD), Headquarters, Marine Corps.

¹⁹⁰ E.g., International Law Officer, Code 10, Office of the Judge Advocate General.

permanent assignment to Joint operational law billets on the staff of the combatant commands that are not structured and aligned to be filled by any particular Service. The requirements for permanently assigned judge advocates to provide operational law support has steadily increased over the years, rising 135% from 2000 through 2012, as portrayed in Figure E, below, reflecting the rising legal intensity and complexity of the modern operating environment.

Figure E. Total permanent operational law billets for active component Marine judge advocates from 2000 to 2012 (*projected based on approved 4402 structure changes).



Despite this increase, the Panel notes that the total projected permanent operational law billets for the Marine Corps in 2012 remains relatively low (47) in comparison to the U.S. Navy (223). This is due to several factors. First, although the Marine Corps has deployed nearly 650 judge advocates in support of OEF and OIF, much of the demand arises from temporary war-time requirements, driven by the nature of operations in those theaters, and has and will continue to decrease as these contingencies abate. Second, the Marine Corps does not have permanent operational law billets equivalent to the U.S. Navy’s “afloat” billets. That is, the U.S. Navy’s enduring, non-contingency mission to maintain freedom of the seas requires naval forces to be routinely engaged in operations throughout the world. These operations require legal advisors to be routinely forward-deployed aboard ships to provide real time operational law advice to ship and task-force commanders. The Marine Corps does not have a non-contingency, operational

¹⁹¹ E.g., Non-Proliferation Planner, Office of Legal Counsel, Chairman of the Joint Chiefs of Staff.

¹⁹² E.g., Instructor/Trainer/Advisor at Naval War College, Marine Corps University, The Army Judge Advocate General’s Legal Center and School (TJAGLCS), and Marine Air Ground Combat Center (MCAGCC), 29 Palms.

equivalent.¹⁹³ Lastly, there are only 12 Marine judge advocates serving in permanent Joint legal billets, in comparison to 56 U.S. Navy judge advocates filling Joint legal billets. The Panel further notes that these judge advocates are all in the grade of O-5 (lieutenant colonel) and below. In recent years, Marines have served as the SJA for U.S. Central Command and U.S. Strategic Command. However, currently Marines do not hold any of these senior, Joint SJA positions, and historically Marines have held a disproportionately small number of these positions.¹⁹⁴ The Panel believes that service in senior legal positions within the Joint community provides individual senior Marine judge advocates important career enhancing experiences, provides the Marine Corps the benefit of O-6 (colonel) judge advocates with senior-level Joint experience, and provides the Joint community the service perspective of the Marine Corps legal community. Accordingly, the Panel recommends that the Marine Corps consider measures to expand opportunities for senior Marine judge advocates to compete for senior legal positions within the Joint community.

b) Emergent Requirements – Within Operational Units

Operation Enduring Freedom – Task Force 58. Shortly after September 11, 2001, the 1st Marine Expeditionary Brigade (MEB), task-organized with, and composed of, the 15th and 26th Marine Expeditionary Units (MEU), and designated Task Force 58 (TF 58), deployed into Kandahar in southern Afghanistan. Their mission was a traditional Marine expeditionary operation – secure a forward operating base ashore, and then secure the Kandahar International Airport to ensure the flow of follow-on forces and material. TF 58 began operations in November 2001, secured the airport in December 2001, and began withdrawing shortly thereafter in January 2002. Judge advocate support was limited to three active-duty Marine judge advocates – the SJA within the command element (i.e., headquarters) of 1st MEB and a SJA within the command element for each subordinate MEU. The SJAs performed traditional

¹⁹³ The Marine Corps does have Marine Expeditionary Units (MEUs), Marine Security Guards, and Marine Security Force detachments routinely forward-deployed, conducting operations, on a non-contingency basis. However, the operational law support requirements (7 MEU SJAs) for these units are accounted for in the projected 47 total permanent operational law billets.

¹⁹⁴ The previous U.S. Central Command (USCENTCOM) SJA, a Marine colonel, was re-assigned along with others on the USCENTCOM staff, when GEN Petraeus was re-assigned from Commander, USCENTCOM to Commander, ISAF and U.S. Forces-Afghanistan, and continues to serve as GEN Petraeus' SJA.

operational law tasks, including advising commanders on Rules of Engagement (ROE), targeting, and detainee handling.¹⁹⁵

Operation Iraqi Freedom I – I Marine Expeditionary Force. Similarly, during OIF I, the Marines’ initial attack into Iraq by I Marine Expeditionary Force (MEF)¹⁹⁶ used conventional maneuver warfare to attack into Iraq and seize objectives in and around Baghdad, withdrawing shortly thereafter. I MEF was task-organized with all of its organic legal support – which included an SJA office, consisting of the SJA and one Deputy SJA – for the MEF command element and each of its major subordinate commands (i.e., 1st Marine Division (MarDiv), 2d Marine Expeditionary Brigade, 3rd Marine Aircraft Wing (MAW), and 1st Force Service Support Group (FSSG)). For the FSSG, this also included its subordinate Legal Service Support Section (LSSS), which was organized to deliver traditional military justice, claims, investigations, and legal assistance support to all commands within the MEF. I MEF crossed the line of departure in March 2003, and secured its objectives less than a month later in April, and began to withdraw in July 2003. The cognizant SJAs performed traditional operational law tasks, including advising commanders on ROE, targeting, and detainee handling.¹⁹⁷ A large part of their duties, however, involved conducting command investigations, either as the appointed investigating officer or as the cognizant legal advisor.¹⁹⁸ The LSSS provided traditional deployed legal services.¹⁹⁹

Operation Iraqi Freedom II - Multi-National Force West. In March 2004, the Marine Corps returned to Iraq for OIF II to conduct stability and security operations in the Al Anbar

¹⁹⁵ See SJA to CMC *Submission, supra* note 38, at 16-17, 18 n.50. See generally U.S. Dep’t of Army, Center for Law and Military Operations, The Judge Advocate General’s Legal Center & School, *Forged in the Fire: Legal Lessons Learned During Military Operations 1994-2008* (Sep. 2008) [hereinafter *Forged in the Fire*].

¹⁹⁶ I MEF, a standing MAGTF, was task-organized with a Ground Combat Element (GCE) consisting of the entire 1st Marine Division (MarDiv) reinforced with Task Force Tarawa (2d MEB) and the UK’s 1st Armored Division, an Air Combat Element (ACE) consisting of the entire 3d Marine Aircraft Wing (MAW), and a Logistics Combat Element (LCE), consisting of the 1st Force Service Support Group (FSSG) (now re-designated the 1st Marine Logistics Group (MLG)).

¹⁹⁷ E-mail from Col William G. Perez, USMC, former Task Force Tarawa SJA, to Major Edward Danielson, USMC, Staff, Independent Review Panel to Study the Judge Advocate Requirements of the Department of the Navy (Sep. 26, 2010, 02:30 EST); see also SJA to CMC *Submission, supra* note 38, at 16-17. See generally *Forged in the Fire, supra* note 195.

¹⁹⁸ See LtGen John F. Kelly, USMC, Commander, Marine Forces Reserve and Commander, Marine Forces North, Transcript of October 13, 2010 Hearing, at 60-62 [hereinafter LtGen Kelly Testimony].

¹⁹⁹ See SJA to CMC *Submission, supra* note 38, at 16-17.

Province.²⁰⁰ The Marine leadership understood that this would be less of a conventional operation, and would instead require more classic counterinsurgency (COIN) strategy and tactics. “Establishing the rule of law is a key goal and end state in COIN.”²⁰¹ The Marine Corps also anticipated that these would be small unit, widely dispersed, independent operations, operating far from the flag pole, and that they would be driven largely by human intelligence, which in turn would rely heavily on detainee operations and interaction with the civilian populace. Further, the Marine Corps believed that the enemy would likely exploit perceived violations of the law of war to affect the population. They believed that proactively investigating and addressing such allegations would be essential in the battle for the populace. The I MEF Commander made the decision to task-organize judge advocates at the regimental and battalion level.²⁰² This decision would ensure that the commanders closest to the situation on the ground could receive instantaneous advice on ROE, targeting, detainee operations, and rule of law operations, as well as legal support for claims, investigations, and fiscal law issues.

In 2004, and for some time thereafter, it was unclear for how long, or to what extent, the Marine Corps would be committed to Al Anbar Province. At the time, the guidance from senior civilian and military leadership was that U.S. forces would begin to redeploy from Iraq as soon as responsibility for security, and a sufficient rule of law system, could be turned over to the Iraqi government. As it turned out, the Marine Corps maintained nearly a MEF-size MAGTF, designated Multi-National Forces-West (MNF-W), in Iraq through January 2010.

For over five years, Marine judge advocates continued to serve at the MEF, division,²⁰³ regiment, and battalion level, as well as at the headquarters of the air combat element (i.e.,

²⁰⁰ A Marine Corps MAGTF, built around a Marine Division, relieved the 82nd Airborne Division of responsibility for Al Anbar province on March 24, 2004, with the assigned mission of conducting Security and Stability Operations (SASO) from March 2004 to March 2005.

²⁰¹ U.S. Dep’t of Army, *Field Manual 3-24, Counterinsurgency*, D-8 (15 Dec. 2006).

²⁰² LtCol Thomas A. Wagoner, *Update on Marine Operational Law*, Marine Corps Gazette, Mar. 2007. There were typically two or three regiments for each MEF rotation, and these were task-organized, through reinforcements, to form Regimental Combat Teams (RCT). Each RCT usually had an O-4/5 SJA and an O-3 Deputy SJA. Each RCT had between two and four battalions (Bns) and several independent, separate companies. Each maneuver Bn (e.g., Infantry, Amphibious Assault or Light Armored Assault) within the RCT typically had one company grade judge advocate assigned.

²⁰³ The last Division to serve as the Ground Combat Element (GCE) in Iraq was in 2005. After 2005, the MEF’s GCE no longer consisted of a singular Division-level headquarters. Rather, the organization was flattened horizontally, and the multiple subordinate Regimental Combat Teams (RCT) headquarters reported directly to the I MEF command element.

Marine Air Wing (MAW)) and the logistics combat element (i.e., Marine Logistics Group (MLG)). Most of these judge advocates served in the command advisor role, advising their commanders not only on operational law, but also on the core legal functions. A few Marine judge advocates were assigned exclusively to operational law duties. These few Marines filled requirements for operational law billets on the staff of the SJA for the command element of the MEF. The MLG continued to operate a deployed LSSS, which provided traditional military justice, administrative law, and investigation support.²⁰⁴

Operation Enduring Freedom – MEF (FWD). As the Marine Corps redeployed forces from Iraq, it began building up forces in southern Afghanistan. In April 2008 the Marines returned to Afghanistan with a single MEU, the smallest standing MAGTF.²⁰⁵ The MEU was relieved in September 2008 by a larger contingency MAGTF, built around several infantry battalions.²⁰⁶ In May 2009, the Marines increased this force to a brigade-sized MAGTF, and then increased it again in May 2010 to a MEF (FWD)-sized MAGTF.²⁰⁷ Capitalizing on lessons learned from OIF, Marine battlefield commanders in Afghanistan currently employ judge advocates at each significant level of command – the MEF (FWD) command element, each Regimental Combat Team (RCT), and each maneuver battalion. Currently, a significant portion of the judge advocates’ duties are of an operational law nature.²⁰⁸

²⁰⁴ Beginning with OIF II, the MLG no longer deployed the entire Legal Service Support Section (LSSS); rather, it deployed smaller task-organized Legal Service Support Teams (LSST), which provided less robust military justice services.

²⁰⁵ This was the 24th MEU, a standing MEU home stationed at Camp Lejeune, North Carolina.

²⁰⁶ This temporary, contingency MAGTF was designated “Special Purpose MAGTF – Afghanistan.”

²⁰⁷ 2d Marine Expeditionary Brigade (MEB) was task-organized for, and designated MEB-Afghanistan (MEB-A) to fill this requirement. MEB-A served as the MAGTF responsible for Marine operations in Helmand Province in southern Afghanistan from May 2009 to May 2010.

²⁰⁸ See Staff Judge Advocate, 2d Marine Expeditionary Brigade (Marine Expeditionary Brigade – Afghanistan), Memorandum for Staff Judge Advocate, II Marine Expeditionary Force, *Subj: Ongoing Assessment of Best Practices To Provide Legal Support to the 2d Marine Expeditionary Brigade – Afghanistan* (25 Oct. 2009); 2d Marine Expeditionary Brigade, *Staff Judge Advocate Afghanistan After Action Report* (7-8 Jun. 2010).

In total, 499 (391 AC / 108 RC) Marine judge advocates deployed as organic or augmented staff within Marine Corps operational units in support of OIF and OEF between 2001 and present. Figure F, to the right, depicts the number of active component Marine judge advocates deployed with Marine operational units, annually, in support of OEF and OIF.

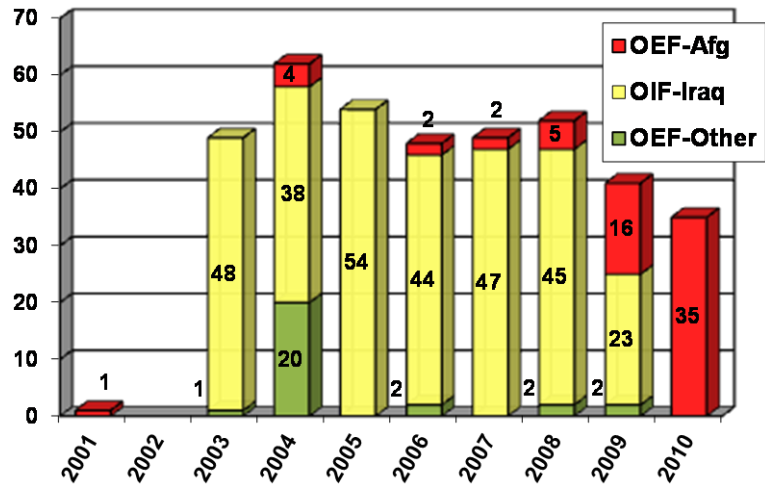


Figure F. Total (391) active component Marine judge advocates deployed as organic or augmented staff within Marine operational units in support of OIF and OEF between September 2001 and September 2010.

c) Emergent Requirements – On Joint Task Forces

A total of 108 (80 AC / 28 RC) Marine judge advocates filled requirements to serve on Joint Task Forces (JTF), including Multi-National Force-Iraq (MNF-I), Multi-National Corps-Iraq (MNC-I) and JTF-134 within Iraq, JTF-HOA in Djibouti as part of OEF, and JTF 101 within Afghanistan. Marines fill these requirements as Individual Augmentees (IAs). The requirements are identified on Joint Manning Documents (JMD), which are proposed by the respective JTF, approved by the respective combatant command, and validated and levied on the services by the Joint Staff.

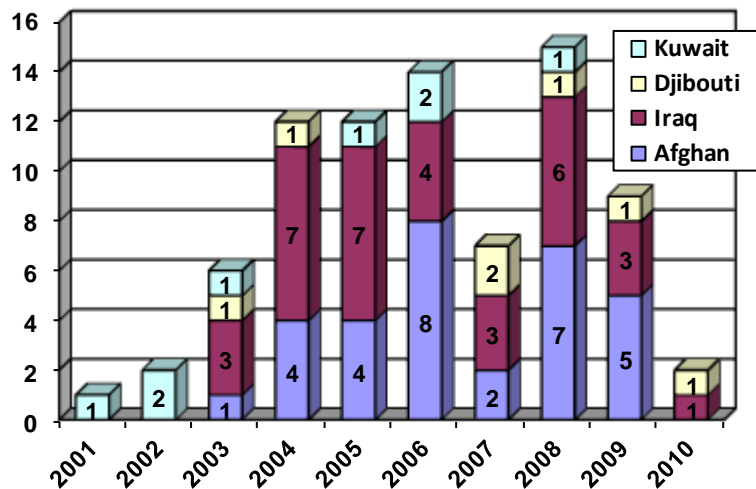


Figure G. Total active component Marine judge advocates (80) assigned and deployed as Individual Augmentees (IAs) to fill a JMD requirement on a JTF.

d) Emergent Requirements – In Support of Rule of Law Objectives in OIF & OEF

There is no agreement upon the definition of “rule of law,” much less what type of operations constitute rule of law operations. Rule of law is a principle of governance in which all persons, institutions, and entities, public and private, including the state itself, are accountable for laws that are publicly promulgated, equally enforced, and independently adjudicated, and which are consistent with international human rights principles.²⁰⁹ Although somewhat oversimplified, rule of law operations are therefore often referred to as those operations designed to assist the host nation government in institutionalizing capacity for “cops, courts and corrections.”²¹⁰

Relatively few Marine judge advocates were, or are, assigned exclusively to support rule of law operations in Iraq and Afghanistan. Generally, legal advice and support to rule of law operations is one of many lines of operations, during COIN or other unconventional operations, in which a judge advocate practicing operational law will provide support. Accordingly, judge advocates serving as command advisors (i.e., SJAs) for Marine operational units, assigned a geographic area of operations, such as the Multi-National Force-West (MNF-W) or its subordinate RCTs and battalions (Bns), provided the bulk of Marine judge advocate support to rule of law operations. Nonetheless, approximately 60 Marine judge advocates²¹¹ were assigned exclusively to rule of law operations. This generally included assignments to the command element for MNF-W²¹² and Individual Augmentations (IAs) to various rule of law billets in Iraq²¹³ and in Afghanistan.²¹⁴

²⁰⁹ U.S. Dep’t of Army, *Field Manual 3-07, Stability Operations*, 1-9 (6 Oct. 2008).

²¹⁰ The Judge Advocate General’s Legal Center & School, U.S. Army Center for Law and Military Operations, *Rule of Law Handbook: A Practitioner’s Guide for Judge Advocates*, 231 (2010).

²¹¹ Most of these billets were filled by reserve component Marine judge advocates.

²¹² These assignments were in the G-9 section, which was composed of the reserve Civil Affairs Group responsible for overseeing Multi-National Force-West (MNF-W) rule of law operations.

²¹³ This generally included assignments to billets on the staff of Multi-National Force-Iraq (MNF-I) and Multi-National Corps-Iraq (MNC-I), responsible for overseeing different components of rule of law operations; to the Central Criminal Court of Iraq (CCC-I), assisting with the prosecution of national security and criminal cases; and to Joint Task Force 134 (JTF-134), assisting with detainee operations.

²¹⁴ This generally includes assignments to billets on the staff of JTF-101 and its predecessors, responsible for overseeing different components of rule of law operations.

e) Meeting Emergent Requirements Through Task-Organization

In total, 685 judge advocates, both active and reserve component, deployed to meet Marine judge advocate requirements in support of OEF and OIF.²¹⁵ As we have noted, most, but not all, of these judge advocates' duties required the practice of operational law. Having discussed these requirements, the Panel believes it is important to understand how the Marine Corps fulfilled these requirements.

By Marine Corps doctrine, a command's legal requirements are met by organic SJA offices, located within the command element of the MEF, as well as within each headquarters of the MEF's major subordinate commands (i.e., MarDiv, MAW, and MLG).²¹⁶ These SJA offices provide command advice and legal service support to their subordinate units (e.g., the MarDiv SJA provides support to its subordinate regiments and battalions). Additional support, as needed, is provided across the MEF by the Legal Services Support Section (LSSS), which is established as a subordinate unit within the MLG.²¹⁷ The Commander, MLG determines, in consultation with the MLG SJA and LSSS Officer in Charge (OIC), how to task-organize the LSSS assets, both in garrison and deployed, to best support the MEF. Ultimately, the I MEF Commander, in consultation with the I MEF SJA, approves the plan for legal services.

The LSSS is task-organized, following the principle of "centralization-where-practical and decentralization-where-required,"²¹⁸ to balance the efficiencies and synergies gained with centralizing legal services against the responsiveness and effectiveness gained by supporting commanders directly with their own organic legal support.²¹⁹ In garrison, the three LSSSs are consolidated at the three major Marine Corps installations – Marine Corps Bases Pendleton,

²¹⁵ This included all requirements for the Marine Corps, within operational units and on JTFs, for all operations in support of OEF and OIF.

²¹⁶ See generally U.S. Marine Corps, Marine Corps Development and Educational Command, *Operational Handbook Number 4-10: Legal Services Support* (31 Jan. 1984) [hereinafter *Operational Handbook 4-10*]; see also U.S. Marine Corps, Marine Corps Warfighting Publication (MCWP) 4-11.8, *Services in an Expeditionary Environment*, Ch. 3, at 3-1 to -10 (24 Sep. 2001).

²¹⁷ The MLG, as the logistics combat element of the MAGTF, is responsible for providing all types of logistic support across the various elements of the MEF, such as fuel, maintenance, transportation, engineering, and services support. This latter category – "services" – includes legal services in addition to postal, dental, medical, and food services.

²¹⁸ *Operational Handbook 4-10*, supra note 216, ¶ 1005.e., at 1-3.

²¹⁹ See *id.*

Lejeune, and Foster – to provide support to the MEF and all of its subordinate elements, as well as the local commands and Marines within the supporting establishment.²²⁰ For deployment, the LSSS is task-organized into smaller Legal Service Support Teams (LSST) or individual judge advocates to provide support to the deployed MAGTF and its subordinate elements.

This doctrinal concept for provision of legal support is designed to provide the capability to meet all of the anticipated legal support needs of a fully operational and deployed MEF-sized MAGTF. To the extent that unanticipated support requirements cannot be met by the LSSS, doctrine calls for filling these temporary requirements with judge advocates from the Total Force, which includes the Marine Forces Reserve.

This doctrinal model assumes that traditional legal requirements are generated by the command, such as military justice and legal assistance, and will therefore generally follow the command. For example, the LSSS would be expected, in the case of a large-scale, long-duration contingency, to task-organize an LSST to provide the full range of military justice services in theater to handle all military justice support requirements. As a result, meeting the legal requirements of a deployed unit would be something of a zero-sum calculation. Accordingly, most of the company grade judge advocates, permanently assigned to traditional military justice, administrative law, and legal assistance duties in garrison with the LSSS, could be expected to perform similar duties while deployed.

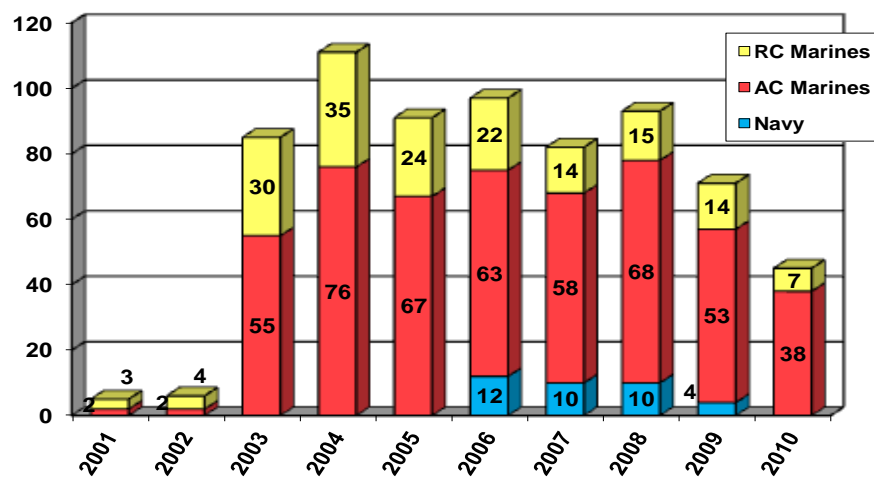
In practice, the Marine Corps generally followed this doctrinal model for meeting legal support requirements for OEF and OIF from 2001 to present. The MEF and its subordinate elements generally deployed to Iraq and Afghanistan with the bulk of the personnel in their organic SJA office.²²¹ However, by 2004, the operational law requirements for the deployed

²²⁰ The Marine Corps is organized broadly into four components: Headquarters, Marine Corps; the operating forces; the supporting establishment; and the Marine Corps Forces Reserve. See MCDP 1-0, *supra* note 39, at 1-17. The operating forces include all of the Marine Corps combat, combat support, and combat service support units assigned to the Joint Forces Command and Pacific Command. See *id.* at 1-18. The operating forces are task-organized for employment as MAGTFs. *Id.* This includes primarily all three MEFs, as well as Marine Security Forces and Marine Special Forces. The supporting establishment assists in the training, sustainment, equipping, and embarkation of deploying forces (e.g., Marine Corps Combat Development Command; Marine Corps Recruiting Command; and Marine Corps bases, air stations, and training installations). *Id.* at 1-22.

²²¹ Approximately 499 of the 649 active and reserve component Marine judge advocates deployed in support of OEF and OIF were assigned to the deployed MAGTF, either in the command element or in one of the subordinate units.

MAGTFs outpaced what could be met by the organic SJA offices within the MEF and Ground Combat Element (GCE). These SJA offices required augmentation. Additionally Marine leadership identified a need for legal support to be task-organized directly to Marine RCTs and maneuver battalions. In accordance with Marine Corps doctrine, the legal support was primarily sourced from the LSSS.²²² To the extent the LSSS, or other sources within the active component, could not address the requirement, the Marine Corps used its reserve component.²²³ The Marine legal community effectively integrated its reserve component as part of the total force, filling nearly one-quarter of the total Marine requirement for judge advocates in OEF and OIF.²²⁴ U.S. Navy judge advocates also provided augmentation for the MEF command element SJA office.²²⁵ Figure H, below, depicts the total number of active and reserve component Marine judge advocates, and U.S. Navy judge advocates that filled Marine Corps requirements.

Figure H. Total number of (AC & RC) Marine and Navy judge advocates that filled the total (685) Marine legal requirements annually in support of OEF and OIF.



²²² Over 170 of the active component Marine judge advocates deployed with Marine units to OIF and OEF were permanently assigned to, and drawn from, the LSSS.

²²³ Over 100 of the 169 reserve Marine judge advocates deployed to OIF and OEF deployed with Marine units.

²²⁴ 169 of a total of 685 Marine judge advocate requirements (including assignment with Marine units and IAs) were filled by Marine reservists.

²²⁵ 36 of the 685 total Marine judge advocate requirements in support of OEF and OIF were filled by U.S. Navy judge advocates. More specifically, U.S. Navy judge advocates filled six billets in FY 06, five billets in FY 07 and FY 08, and two billets in FY 09. Individual Augmentees assigned to the Marine Expeditionary Force (MEF) staff normally deployed for 12-14 months. However, as the individual U.S. Navy augments were only made available to the Marine Corps for six-month rotations, this effectively doubled the amount of U.S. Navy judge advocates used to fill these billets. All of the 36 U.S. Navy judge advocate augments served on the MEF SJA staff, except for two U.S. Navy lieutenants who served as detainee operations officers for Regimental Combat Team-2 (RCT-2) at Camp Ripper, Al Asad Air Base, and RCT-6 at Camp Fallujah, during the height of the surge in Al Anbar in 2007. See SJA to CMC Submission, *supra* note 38, at 17.

However, two dynamics affected the practical application of the Marine Corps' legal services support doctrine, adversely affecting the performance of the remain-behind military justice mission. First, although legal requirements generated by the command in theater could be, and were, met by the deployed legal resources, this does not account for the fact that many units left behind Marines with pending courts-martial and administrative separations when the unit deployed forward. Further, many serious disciplinary problems discovered in theater were addressed by returning the accused Marine to garrison for disposition, and the resolution of many minor disciplinary actions was delayed until returning to garrison. This phenomenon resulted in a significant, although reduced, remain-behind military justice mission. Second, the decision to task-organize individual field grade and company grade officers to RCTs and maneuver battalions, while proven to be extremely effective, was costly in judge advocate manpower.

These two unforeseen circumstances competed against one another for a limited pool of resources. As a result, there was a high turnover rate among company grade officers in military justice billets within the LSSSs and larger law centers, reducing the aggregate level of experience of available trial and defense counsel.²²⁶

Because Marine operations in Iraq have already concluded and once forces in Afghanistan have redeployed, the Marine Corps intends that judge advocates will return to garrison to a traditional model – where judge advocates are assigned to SJA offices within the MEF and its Major Subordinate Commands (MSCs) and a consolidated LSSS. It is not anticipated, nor has the Marine Corps suggested, that judge advocates will be permanently assigned to regiments and battalions upon return to garrison.²²⁷ The Panel believes that the anticipated reduction in demand for judge advocates to be tasked-organized to regiments and battalions, along with the addition of 32 officers to the 4402 structure, should alleviate the strain on the judge advocate force and the military justice mission.

The Panel further notes that the Marine Corps is currently in the process of completely re-writing its doctrine for legal services support to Marine Corps expeditionary operations. The Panel expects this undertaking will consider, and, where appropriate, incorporate, the lessons

²²⁶ See SJA to CMC *Submission*, *supra* note 38, at 29; see Staff Judge Advocate to the Commandant, *U.S. Marine Corps Legal Services Military Justice Report 2010*, 3 (17 Dec. 2010) [hereinafter *USMC Military Justice Report 2010*].

²²⁷ LtGen Kelly Testimony, *supra* note 198, at 70.

learned from OEF and OIF, in particular the increased need for operational law support to deployed MAGTFs at the command element level and throughout the MAGTF, including the lowest maneuver elements. Further, lessons learned from OEF, OIF and even Desert Storm and Desert Shield, suggest that the days of a robust “field” military justice operation, including the conduct of special and general courts-martial in theater, such as was the case in Vietnam, may prove to be the exception to the rule in future contingencies.²²⁸

The Panel notes that the impact of task-organizing judge advocates from the total force to augment deploying units was mitigated, in part, by the historical decrease in courts-martial, which has continued throughout OEF and OIF. This decrease has allowed the legal services community to man the remain-behind elements of the LSSS and Law Centers, while maintaining the average number of cases per counsel at a manageable level.²²⁹

5. Operational Law Education & Training for U.S. Navy and Marine Judge Advocates

Senior Commanders testified to the Panel that it is essential that judge advocates performing operational law duties arrive in theater with the education, training, and experience necessary to be effective on arrival.²³⁰ Requirements to prepare judge advocates for operational law demands evolve alongside the demand as lessons learned in contingency operations are compiled, disseminated, and absorbed by the service components. To address these demands, the Services have implemented measures to improve the training and equipping of judge advocates to ensure that they are prepared to provide effective and efficient operational law capability to the supported commanders.

Basic Operational Legal Training (BOLT). Initiated in 2002, this five-day training program gives new judge advocates a working foundation in international and operational law. Originally, it was a “Marine-only” program given at the beginning or end of the ten-week Basic

²²⁸ Conduct of the Persian Gulf War, *supra* note 157, at 605-32. See generally Borch, *supra* note 157.

²²⁹ See SJA to CMC Submission, *supra* note 38, at 24, 29.

²³⁰ See, e.g., VADM Bird Testimony, *supra* note 111, at 25-28, 51-52; LtGen Richard F. Natonski, USMC (Ret.), Commander, U.S. Marine Corps Forces Command, Transcript of October 13, 2010 Hearing, at 36-37, 43 [hereinafter LtGen Natonski Testimony]; CAPT Pedrozo Testimony, *supra* note 162, at 106-07.

Lawyer Course (BLC).²³¹ In August 2006, the program became a formal part of the Naval Justice School BLC curriculum, and now both Navy and Marine judge advocates participate.²³²

The Center for Law and Military Operations (CLAMO). CLAMO is a Joint, interagency, and multinational legal center responsible for collecting and synthesizing data relating to legal issues arising in military operations, managing a central repository, and disseminating resources, to facilitate the development of doctrine, organization, training, materiel, leadership, personnel, and facilities as these areas affect the military legal community. Both U.S. Navy and Marine judge advocates are assigned to CLAMO to assist in collecting valuable input from those returning from overseas contingencies, as well as disseminating it to the U.S. Navy and Marine legal community.²³³

Pre-Deployment Legal Training (PDLT). PDLT is a program in which Marine judge advocates preparing to deploy receive refresher training and the latest updates on legal issues in their planned area of operations.²³⁴ These training periods are organized and managed by the respective Marine Expeditionary Force (MEF) SJAs.

Operational Law Training at Mojave Viper. Mojave Viper is the training program developed at the Marine Corps Air-Ground Combat Center (MCAGCC) in 29 Palms, California to train Marine combat units rotating into Iraq and Afghanistan in support of OIF and OEF. Each unit's assigned judge advocate participates in this training along with his unit. Beginning in May 2006, a Marine judge advocate was added to the Tactical Training Exercise Control Group (TTECG) at Mojave Viper.²³⁵ This instructor incorporates training in detainee operations, Law of Armed Conflict (LOAC), Rules of Engagement (ROE), and Escalation of Force measures into the entire curriculum, including classroom training, practical application, and the final exercise.²³⁶

²³¹ SJA to CMC *Submission*, *supra* note 38, at 18; see Marine Corps Center for Lessons Learned, *Legal Services Support to Operational Commanders: A Summary of Observations and Lessons from OEF/OIF Judge Advocates and Infantry Commanders*, 6 (3 May 2006) [hereinafter *MCCLL OEF/OIF Lessons Learned*].

²³² SJA to CMC *Submission*, *supra* note 38, at 18.

²³³ *See id.*

²³⁴ *Id.*

²³⁵ *Id.* The judge advocate instructor billet was added in response to a Marine Corps Center for Lessons Learned (MCCLL) report. See *MCCLL OEF/OIF Lessons Learned*, *supra* note 231, at 6.

²³⁶ SJA to CMC *Submission*, *supra* note 38, at 18.

Joint Professional Military Education (JPME). The JAG stressed the importance of JPME,²³⁷ however, he noted that the U.S. Navy does not have a developed JPME program for judge advocates.²³⁸ This is due to the fact that U.S. Navy judge advocates are waived from the Joint Specialty Officer provisions of the *Goldwater-Nichols Department of Defense Reorganization Act of 1986*.²³⁹ Hence, U.S. Navy programmers do not recognize JPME as a valid requirement for U.S. Navy judge advocates. As the JAG explained,

JPME right now, because there is no joint duty requirement for judge advocates, it's very difficult within a Service to say we have a requirement to do JPME. . . . In some respects, I feel like the blue suit Navy's program is the weakest of all of them and the least developed at this point . . . And so I just highlight it as an important area going forward where, within our own system in the Navy, I think because we don't have a formal – a requirement for it, then nobody really considers that in the resourcing equations.²⁴⁰

In the view of the Panel, the U.S. Navy needs to develop and fund a requirement for its judge advocates to receive JPME.

²³⁷ Joint Professional Military Education (JPME) I and JPME II partially satisfy requirements to achieve Joint Specialty Officer (JSO) designation under the Goldwater-Nichols Defense Reorganization Act of 1986. See Chairman of the Joint Chiefs of Staff Instr. 1800.01D, *Officer Professional Military Education Policy (OPMEP)* (15 Jul. 2009) [hereinafter CJCSI 1800.01D]. Under CJCSI 1800.01D, JPME is divided into three phases: (1) JPME I - A first phase of JPME is incorporated into the curricula of intermediate- and senior-level Service colleges and other appropriate educational programs, which meet JPME criteria and are accredited by the Chairman, Joint Chiefs of Staff. *Id.* at A-A-6, GL-6. By law, the subject matter to be covered shall include at least the following: (a) national military strategy, (b) Joint planning at all levels of war, (c) Joint doctrine, (d) Joint command and control, and (e) Joint force and joint requirements development. *Id.* at GL-6. (2) JPME II – A follow-on second phase of JPME for selected graduates of Service schools and other appropriate education programs that complements and enhances Phase I instruction. This phase is taught at Joint Forces Staff College and other accredited schools to both intermediate- and senior-level students and at Service senior level colleges to senior-level students, and completes their educational requirement for joint officer management. *Id.* at A-A-6, GL-6. In addition to the subjects specified in JPME Phase I above, by law, the curriculum for Phase II JPME shall include the following: (a) national security strategy; (b) theater strategy and campaigning; (c) Joint planning processes and systems; and 4) Joint, interagency, intergovernmental, and multinational capabilities and the integration of those capabilities. *Id.* at GL-6. (3) CAPSTONE – CAPSTONE, the third phase of JPME, is a mandated six-week course for newly selected flag and general officers. *Id.* The course objective is to make these individuals more effective in planning and employing U.S. forces in joint and combined operations. *Id.* appendix K to enclosure (E). The CAPSTONE curriculum examines major issues affecting national security decision-making, military strategy, joint and combined doctrine, interoperability, and key allied nation issues. *Id.*

²³⁸ VADM Houck Testimony, *supra* note 107, at 158-60.

²³⁹ Goldwater-Nichols Department of Defense Reorganization Act of 1986, Pub. L. No. 99-433, 100 Stat. 992 (1986).

²⁴⁰ VADM Houck Testimony, *supra* note 107, at 158-60.

Like their U.S. Navy judge advocate counterparts, Marine judge advocates are waived from the Goldwater-Nichols requirements. However, Marine judge advocates are required to complete JPME as part of their Service's general Professional Military Education requirements.²⁴¹

Post-Graduate Education. The JAG and the Staff Judge Advocate to the Commandant of the Marine Corps (SJA to CMC) stressed the importance of post-graduate education leading to a Master-of-Laws (LL.M.) degree in international law or environmental law.²⁴² The JAG stated that the U.S. Navy currently sends, on average, 25 judge advocates per year through LL.M. programs, including international and environmental law, and its goal is to expand to 30 per year.²⁴³ Similarly, the Marine Corps' Special Education Program (SEP), Advance Degree Program (ADP), and The Judge Advocate General Legal Center and School (TJAGLCS) offer Marine judge advocates the opportunity to obtain a LL.M. in, among other concentrations, international law. An LL.M. in international law leads to the assignment of an additional Military Occupational Specialty (MOS) of 4405.²⁴⁴

6. Future Operational Law Requirements

The Panel believes that operational law demands for U.S. Navy and Marine judge advocates will continue to rise. The *Quadrennial Defense Review (QDR)* portends an operational landscape rife with increasingly complex legal and policy issues – particularly for the sea Services. The *QDR* describes four enduring trends: the rise of new powers; the growth of non-state actors; lowered barriers for dangerous technologies, including missile technologies and weapons of mass destruction; and a competition for resources driven by demographics, climate change, and disease. These trends, in turn, will contribute to an operational landscape in which U.S. Armed Forces will have to deal with increasingly multi-dimensional or hybrid threats,

²⁴¹ See *infra* Section III.F.

²⁴² VADM Houck Testimony, *supra* note 107, at 148-49 (also highlighting a new program that is being developed with George Washington University to include cyber law studies within an LL.M. program). See also Major General (MajGen) Vaughn A. Ary, USMC, Staff Judge Advocate to the Commandant of the Marine Corps, Transcript of September 1, 2010 Hearing, at 311 [hereinafter MajGen Ary Testimony]; VADM Houck Presentation, *supra* note 4, at 63.

²⁴³ VADM Houck Testimony, *supra* note 107, at 171.

²⁴⁴ Headquarters, Marine Corps anticipates that funding will be available this year for 5 SEP LAW students and 15 students to attend TJAGLCS. However, not all will concentrate in international law and obtain the additional MOS of 4405.

threats to the global commons including the cyber domain, growing anti-access/area denial capabilities, and weak or failed States that are incapable of, or unwilling to, maintain the rule of law.

The Panel takes particular note of the emerging operational law challenges presented by cyber warfare.²⁴⁵ The Panel commends the JAG's efforts in this respect. The Panel notes that while the Marine Corps has recently structured and filled a SJA billet within the recently established Marine component of United States Cyber Command and has included cyber law as one of the disciplines in its post-graduate education program, it is still determining the requirement in this area. As the SJA to CMC stated,

I think the Marine Corps is – is quantifying and assessing that requirement. I think that's a very hard thing to figure out. We've been lagging behind the Air Force and some of the other services in cyber law. We're going to have to figure out how to position ourselves for that requirement, but I couldn't begin to start to put a number or quantify that in an analytical way.²⁴⁶

Although it is difficult to calculate future manpower requirements for any community, the Panel believes, based on this near-certain future operating environment, that the demand signal for judge advocates with expertise in operational law will continue to grow at least at the same rate as it has since September 11, 2001. This means that the growth in permanent operational law billets can be expected to approximately double over the next decade for each Service.

In addition, the Panel notes the continued and forecasted demand signals for judge advocates in contingency operations. The Panel was particularly impressed with the importance of judge advocates in the execution of counterinsurgency operations, especially in rule of law operations. For example, GEN Petraeus, USA, Commander, NATO International Security Assistance Force, and Commander, U.S Forces Afghanistan, stated that in Iraq he relied on judge advocates to execute civil-military affairs missions, such as helping local populations hold elections; to provide contracting assistance in support of re-construction projects; and to design

²⁴⁵ The definition and scope of the cyberlaw practice area is still being determined and is likely to be an area of practice supported by both judge advocates and civilian counsel. For instance, JAG and OGC both have attorneys assigned to U.S. Tenth Fleet (*see supra* note 176), and the SJA to CMC and the Counsel to the Commandant provide legal support to Marine Corps Forces, U.S. Cyber Command.

²⁴⁶ MajGen Ary Testimony, *supra* note 242, at 373-74.

rule of law “green zones” – secure areas accommodating courtrooms, counsel offices, and detention and corrections facilities.²⁴⁷

Both GEN Petraeus and VADM Harward, USN, Commander, Joint Interagency Task Force 435, Afghanistan, made the point that the overarching rule of law mission falls under the primary responsibility of the Department of State Bureau for International Narcotics and Law Enforcement Affairs and the Department of Justice.²⁴⁸ However, those agencies are not “manned, trained and equipped” to execute the mission on the scale that is required in Afghanistan.²⁴⁹ Therefore, both officers employ judge advocates to take a leading role in the execution of the rule of law mission at the operational and tactical levels. This requires judge advocates to assume greater duties than those that they have traditionally performed in previous conflicts.²⁵⁰

With respect to the rule of law mission and judge advocate support to counterinsurgency operations, GEN Petraeus testified that judge advocates would likely be required to remain in theater after combat forces have redeployed.²⁵¹ In fact, that has been the case in Iraq. The Panel further notes that the February 2010 *Quadrennial Defense Review (QDR)* concluded that the outcome of the conflicts in Iraq and Afghanistan, and against al Qaeda, will shape the security environment for decades to come. Assuming that assessment is correct, the Panel believes it essential that the Services increase their level of investment in judge advocates, both in quantity and quality. As the last decade has demonstrated, there are very high costs associated with attempting to execute global counterterrorism and counterinsurgency operations without sufficient legal resources.

Before concluding its discussion of future operational law requirements, the Panel desires to comment briefly on the relationship of judge advocates to the DoD Joint Officer Management Program and the Joint Officer Qualification System. One of the cornerstones of the *Goldwater-Nichols DoD Reorganization Act of 1986* was the mandate that officers be designated a Joint

²⁴⁷ GEN Petraeus VTC Summary, *supra* note 162, at 1.

²⁴⁸ GEN Petraeus VTC Summary, *supra* note 162, at 2; see VADM Harward VTC Summary, *supra* note 162, at 2.

²⁴⁹ GEN Petraeus VTC Summary, *supra* note 162, at 2.

²⁵⁰ GEN Petraeus VTC Summary, *supra* note 162, at 2-3; see VADM Harward VTC Summary, *supra* note 162, at 2.

²⁵¹ GEN Petraeus VTC Summary, *supra* note 162, at 3.

Qualified Officer as a prerequisite to promotion to flag or general officer rank.²⁵² In the aftermath of Goldwater-Nichols and follow-on legislation, the DoD has developed a complex and comprehensive system for Joint Officer Management, including formal processes for attaining Joint qualification through either formal Joint duty assignment or by accumulating an equivalent level of joint experience, education, and training.²⁵³ However, Goldwater-Nichols also permitted the Secretary of Defense to waive judge advocates from these formal requirements, and the Secretary has exercised that waiver. Thus, judge advocates have not been formally incorporated into the Joint Duty Assignment Management System, nor have they been formally required to obtain Joint qualification. That, in turn, has resulted in informal and inconsistent approaches to judge advocate participation in Joint service, education, and training across the Services. Given the growth in operational law requirements since September 11, 2001 and the expanding role of the judge advocate within Joint command structures, the Panel believes that the DoD should develop options for formalizing judge advocate participation in the Joint officer management program and Joint qualification system.

In conclusion, in the view of the Panel, the number of permanent operational law billets in the DON can be expected to approximately double over the coming decade, and there will continue to be a strong demand for judge advocates in support of contingency operations. The judge advocates who fill operational law billets will require levels of education, training, and experience commensurate with the increasingly complex legal and policy environment in which they and their commanders will operate.

C. Review of Requirements to Support Military Commissions

The Panel was directed to review “new requirements to support the Office of Military Commissions”²⁵⁴ As part of its review, the Panel received the testimony of VADM Bruce

²⁵² 10 U.S.C. §§ 601, 619 (2010).

²⁵³ See, e.g., U.S. Dep’t of Defense, Instr. 1300.19, *DoD Joint Officer Management Program* (Oct. 31, 2007, incorporating Change 2, Feb. 16, 2010) [hereinafter DoDI 1300.19]; U.S. Dep’t of Defense, *Joint Officer Management, Joint Qualification System Implementation Plan* (Mar. 30, 2007). One of the key policy objectives of Joint Officer Management is to ensure that “officers on the Active Duty List be assigned such that they can be credited with having completed a full joint assignment before appointment to brigadier general or rear admiral (lower half).” DoDI 1300.19, *supra*, ¶ 4.11, at 3.

²⁵⁴ National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111-84, § 506(b)(2)(B), 123 Stat. 2190 (2009).

MacDonald, JAGC, USN (Ret.),²⁵⁵ who serves as the Military Commissions Convening Authority within the Office of Military Commissions (OMC). The Panel also reviewed the laws, regulations, executive orders, and related public documents concerning military commissions and OMC.

1. Current Requirements

Under chapter 47A, title 10, United States Code, the President is authorized to establish military commissions to try alien unprivileged belligerents for alleged violations of the laws of war or certain other offenses.²⁵⁶ Within the DoD, OMC is responsible for the administration of military commissions,²⁵⁷ including providing the convening authority, prosecution, and defense counsel.²⁵⁸ Under direct tasking from the Deputy Secretary of Defense, the existing manpower requirements to support OMC (and an independent trial judiciary) include 206 full-time military positions, 87 full-time civilian positions, a pool of 9 military trial judges available to preside in military commissions cases as required, and 10 military appellate judges who sit as a U.S. Court of Military Commissions Review in addition to their investitures in their respective military appellate courts.²⁵⁹ Of those 206 military positions, 112 are judge advocate positions, distributed

²⁵⁵ VADM Bruce E. MacDonald, JAGC, USN (Ret.), Department of Defense Convening Authority for Military Commissions, Transcript of October 6, 2010 Hearing at 6-36 [hereinafter VADM MacDonald Testimony]. VADM MacDonald served as the Judge Advocate General of the Navy from July 2006 to October 2009.

²⁵⁶ 10 U.S.C. §§ 801-946 (2010); cf. 10 U.S.C. § 948b (2010) (comparing the provisions of the Uniform Code of Military Justice to the authority for military commissions).

²⁵⁷ The military commissions process begins when the prosecution drafts charges and the convening authority refers the case to trial. U.S. Dep't of Defense, Office of Military Comm'ns, *Office of Military Commissions Fact Sheet* (Current as of April 2010).

²⁵⁸ *Id.*; see also <http://www.defense.gov/news/commissions.html> (providing background information concerning military commissions).

²⁵⁹ VADM Bruce E. MacDonald, JAGC, USN (Ret.), the Convening Authority for Military Commissions, explained to the Panel that the manpower requirements for the Office of Military Commissions (OMC) have been established through a series of Directive Type Memoranda from the Deputy Secretary of Defense, dating back to 2002. VADM MacDonald Testimony, *supra* note 255, at 6-9; VADM Bruce E. MacDonald, JAGC, USN (Ret.), Department of Defense, Convening Authority for Military Commissions, *Office of Military Commissions: Military and Civilian Personnel Briefing*, 2-7 (Oct. 6, 2010) [hereinafter VADM MacDonald Presentation].

The original 2002 requirements were for 40 military and 25 civilian positions. VADM MacDonald Testimony, *supra* note 255, at 6; VADM MacDonald Presentation, *supra*, at 2. In December 2004, an additional 24 military and 26 civilian positions were established. VADM MacDonald Testimony, *supra* note 255, at 7; VADM MacDonald Presentation, *supra*, at 3. In November 2006 the requirement grew by an additional 28 military positions, and in May 2008 the requirement grew yet again for an additional 114 military personnel. VADM MacDonald Testimony, *supra* note 255, at 8-9; VADM MacDonald Presentation, *supra*, at 4-6. Also, in June 2008, 36 additional civilian positions were added to OMC by the Washington Headquarters Service (WHS), a component of the DoD. VADM MacDonald Presentation, *supra*, at 7; see also VADM MacDonald Testimony, *supra* note 255, at 9. With regard to

among the four Services as indicated below in Table 10.²⁶⁰ The number of judge advocates currently assigned is also denoted.²⁶¹

	Army	Navy	Air Force	Marine	Total
Requirement	35	30	34	13	112
Assigned	15	28	21	13	77

Table 10. Total judge advocate requirements and assignments for OMC

The Department of the Navy is also required to provide 22 Navy enlisted legalmen, 8 Marine Corps enlisted legal services specialists, and 4 Navy criminal investigators.²⁶² The Department of the Navy meets those requirements in the aggregate, although it only assigns two

the trial and appellate judiciaries, both are independent; neither is assigned to OMC. VADM MacDonald Testimony, *supra* note 255, at 6-9; VADM MacDonald Presentation, *supra*, at 2-7, 15-16.

²⁶⁰ VADM MacDonald Presentation, *supra* note 259, at 8. At the Panel's public hearing on October 6, 2010, Chairman Dell'Orto questioned VADM MacDonald about the shortfall for the Army and Air Force. Mr. Daniel J. Dell'Orto, Chairman, Independent Panel to Review the Judge Advocate Requirements of the Department of the Navy, Transcript of October 6, 2010 Hearing, at 17. VADM MacDonald responded,

Well, I've talked to the TJAG of the Air Force, and I've allowed the Air Force and Army to not assign people. They have other missions that they've said they need to assign folks to, and up to this point, the way we're dealing with this is kind of taking it day by day, see where [the] commissions go. And it really depends on what the president and attorney general do with respect to commissions. If we remain at the current levels, we'll be done in pretty short order, I think, with commissions, so what I've allowed in particular in talking to General Harding at the Air Force, he asked if he could delay assigning three of his prosecutors to the prosecution function, keep them in Washington, DC, close by, such that if we got the word that we were going, if we got additional cases assigned to commissions, then Rich Harding is ready to assign them over to the prosecution function. Frankly, we don't have enough work at this point to keep them all busy, so we talk a lot about assignments and filling some of these billets, simply because there's just not the caseload that I think we expected at this point.

VADM MacDonald Testimony, *supra* note 255, at 17-18.

²⁶¹ This breakout does not include a Service-immaterial judge advocate position that has not been filled, but which, when included, brings the total requirement to 113 judge advocates. VADM MacDonald Presentation, *supra* note 259, at 14.

²⁶² VADM MacDonald Testimony, *supra* note 255, at 11-13; VADM MacDonald Presentation, *supra* note 259, at 10-11. The Department of the Navy provides two legalmen above requirement, and two of the four required criminal investigators. VADM MacDonald Presentation, *supra* note 259, at 10. The Army is required to provide 24 enlisted paralegals, 4 criminal investigators (warrant officers), an enlisted court reporter, and an administrative officer (warrant officer). *Id.* at 7, 12; *see also* VADM MacDonald Testimony, *supra* note 255, at 13-14. The Air Force is required to provide 22 enlisted paralegals, 4 criminal investigators (officer and enlisted), and an enlisted court reporter. VADM MacDonald Presentation, *supra* note 259, at 12-13; *see also* VADM MacDonald Testimony, *supra* note 255, at 14.

of the four required criminal investigators. It also assigns two legalmen above the requirement for 22.

2. Future Office of Military Commissions Requirements

On January 22, 2009, the President issued Executive Order 13492 calling for a prompt and comprehensive interagency review of the status of all individuals then detained at the Guantanamo Bay Naval Base.²⁶³ In the interim, the Executive Order directed that “no charges [be] sworn, or referred to a military commission . . . and that all proceedings of such military commissions to which charges have been referred but in which no judgment has been rendered, and all proceedings pending in the United States Court of Military Commission Review, [be] halted.”²⁶⁴

The interagency review was completed within one year, and on January 22, 2010, the Attorney General published a *Final Report: Guantanamo Review Task Force*,²⁶⁵ which summarized the recommended dispositions of the 240 detainees. The interagency task force recommended 36 detainees for prosecution, including the 5 alleged September 11, 2001 co-conspirators and the alleged mastermind of the bombing of the USS COLE.²⁶⁶ Of those 36 detainees, 6 were recommended for prosecution in federal district court and 6 for prosecution by military commissions.²⁶⁷ No recommendations were made with regard to the other 24 detainees.²⁶⁸

²⁶³ See Exec. Order No. 13492, 74 Fed. Reg. 4897 (Jan. 22, 2009).

²⁶⁴ *Id.* § 7.

²⁶⁵ *Final Report: Guantanamo Review Task Force* (Jan. 22, 2010) [hereinafter *Final Report: Guantanamo*], available at www.justice.gov/ag/guantanamo-review-final-report.pdf.

²⁶⁶ Forty-four detainees were originally recommended for prosecution, but eight of those detainees were subsequently recommended for alternate dispositions (transfer or continued detention without prosecution). *Id.* at ii. That left 36 detainees with active cases or investigations. *Id.* In addition to those 36 detainees recommended for prosecution, the interagency approved 126 detainees for transfer, determined 48 were “too dangerous to transfer but not feasible for prosecution,” and approved 30 for potential transfer to Yemen. *Id.*

²⁶⁷ E-mail from Michael Chapman, Office of the Secretary of Defense, Legal Advisor to the Convening Authority Office of Military Commissions, to Lieutenant Commander Raghav Kotval, JAGC, USN, Staff, Independent Review Panel to Study the Judge Advocate Requirements of the Department of the Navy (Nov. 9, 2010, 15:09 EST). One of the six cases forwarded to the Military Commissions is pending trial. *Id.* Two of the six cases have been disposed of through guilty pleas, and three of the six cases are on hold pursuant to Executive Order 13492 of January 22, 2009. *See id.*

²⁶⁸ *Final Report: Guantanamo*, *supra* note 265, at 11-12.

Today, it is not known how many detainees will be tried before military commission. Thirty-four cases remain of the 36 recommended by the interagency for prosecution, including the five alleged September 11, 2001 co-conspirators.²⁶⁹

VADM MacDonald, the Convening Authority for Military Commissions, was asked to opine on OMC's manpower requirements in two hypothetical situations: the first in which all, or most, of the 34 cases were referred for trial in federal district court; and the other in which most, or all, of those cases were referred for trial before military commission. VADM MacDonald stated that if the 34 cases were referred to federal district court for prosecution, OMC would likely be disestablished.²⁷⁰

VADM MacDonald testified that if all 34 cases were referred for trial by military commission, the existing manpower requirements established by the Deputy Secretary of Defense would be sufficient to try those cases. This conclusion was contingent on three assumptions: one, that the prosecutions would be a collaborative effort between the Department of Defense and the Department of Justice, with attorneys provided by both agencies;²⁷¹ two, that the military Services filled all their respective requirements, civilian and military; and three, that the military Services provided their most experienced and accomplished litigators to OMC.²⁷² On the latter point, VADM MacDonald acknowledged that there would be tension between assigning the best and brightest litigators to OMC and maintaining sufficient litigation expertise and leadership in the individual Service judge advocate organizations.²⁷³ He concluded nonetheless that military commissions, if chosen for all or most of the 34 cases, would have to take priority. The Panel believes that on this point, it is worth highlighting the following colloquy that occurred between VADM MacDonald and a Panel member, Ms. Judith Miller. Ms. Miller stated,

²⁶⁹ As of the writing of this report, two detainees have pled guilty. Ibrahim Ahmed Mahmoud al Qosi pled guilty on July 7, 2010. <http://www.washingtonpost.com/wp-dyn/content/article/2010/07/07/AR2010070704734.html>. Omar Khadr pled guilty on October 25, 2010 and was sentenced on October 31, 2010. <http://www.defense.gov/releases/release.aspx?releaseid=14023>.

²⁷⁰ VADM MacDonald Testimony, *supra* note 255, at 31.

²⁷¹ *Id.* at 21, 25.

²⁷² *Id.* at 28-29.

²⁷³ *Id.* at 32-33.

Just maybe an editorial comment, which is I completely understand what you've said about the tensions in deciding how to assign experienced versus somewhat less experienced people . . . and I think you are, if the military commissions do start rolling, if we don't really put on a world class performance, we're going to undermine the integrity of the overall military justice system in a way that really, I think, change[s] in a very bad way the mindset of our [sic] both our military in the United States and how we're looked at abroad.²⁷⁴

VADM MacDonald responded,

I agree with that completely. If we're serious about military commissions, you know, to me, this is the time for our JAG Corps to shine, and to do that, you have to go, I think, with the best and brightest and most experienced in the courtroom, and I think that's something that we need to keep in mind is [that] that you can be a wonderfully talented attorney but just not have the kind of litigation skills to navigate in a courtroom. I think to be a successful litigator you have to have done case after case after case, and that's what I'm really looking for if we start focusing on doing these cases in a military commissions context²⁷⁵

The Panel believes that while future judge advocate requirements to support OMC are uncertain, they most likely will not increase in quantity even if all 34 cases are referred to trial before military commissions, but only if VADM MacDonald's three assumptions are met. It is possible that the current requirements established by the Deputy Secretary of Defense will be extended beyond December 2012. If so, then current Navy and Marine judge advocate end-strength planning, which only accounts for OMC judge advocate requirements through 2012, will need to be adjusted.

If all, or a significant number, of the 34 cases are prosecuted by military commissions, there will be a call from OMC for the most experienced and accomplished litigators. These litigators will most likely be serving in positions of significant responsibility within their judge advocate communities. The balancing of the need to provide OMC with the best litigators, while maintaining the right level of judge advocate experience and expertise within the Navy and the Marine Corps, will be challenging and must be carefully addressed by Service leadership.

The Panel believes that the prospect of future military commissions underscores the need to develop and retain experienced, expert trial litigators in the judge advocate communities of all

²⁷⁴ Ms. Judith A. Miller, Member, Independent Panel to Review the Judge Advocate Requirements of the Department of the Navy, Transcript of October 6, 2010 Hearing, at 34.

²⁷⁵ VADM MacDonald Testimony, *supra* note 255, at 34-35.

the Services. In particular, that prospect supports the effort of the Judge Advocate General of the Navy to develop the military justice litigation career track for U.S. Navy judge advocates, and the effort of the SJA to CMC to develop and fill Masters of Criminal Law designated billets within the Marine Corps.²⁷⁶ In the view of the Panel, it is essential that the DON have a sufficient number of experienced trial litigators and judges to simultaneously support military commissions and the traditional military justice system at the highest possible levels of professionalism.

D. Review of Requirements to Support the Disability Evaluation System

The Panel was directed to review “new requirements . . . to support the disability evaluation system for members of the Armed Forces.”²⁷⁷ As part of its review, the Panel received the testimony of Mr. Robert C. Powers, President, Department of the Navy/Marine Corps Physical Evaluation Board; Captain (CAPT) Michael I. Quinn, JAGC, USN, Assistant Judge Advocate General (AJAG) (Civil Law); and Lieutenant Colonel (LtCol) Peter C. Faerber, USMC, one of four U.S. Marine Corps Wounded Warrior Counsel. The Panel also reviewed information provided by the JAG and the SJA to CMC.

1. Understanding the Integrated Disability Evaluation System

The Department of the Navy is transitioning to the Integrated Disability Evaluation System (IDES) pursuant to the *Wounded Warrior Act*.²⁷⁸ The IDES is the process by which the DoD determines whether Wounded, Ill, or Injured (WII) service members are fit for continued military service, and for those who are not fit for continued military service, IDES is the process whereby the DoD and the Department of Veterans Affairs (VA) determine the service members'

²⁷⁶ Those initiatives are discussed further in Section III, *infra*, of this report. The Military Justice Litigation Career Track is an initiative within the Navy JAG Corps that ensures, among other things, that judge advocates with specialized court-martial litigation qualifications are assigned to key military justice billets. U.S. Dep't of Navy, Judge Advocate General Instr. 1150.2A, *Military Justice Litigation Career Track*, ¶ 5.b., at 6 (Jun. 17, 2009) [JAGINST 1150.2A]. Masters of Criminal Law billets in the Marine Corps are identified with a Necessary Military Occupational Specialty (NMOS) numerical code of 4409. MCO 1200.17B, *supra* note 116, ¶ 1127.6. of enclosure (1), at 1-141. Once a billet is so designated, it should only be filled by Marine judge advocates possessing the required post-graduate education and NMOS. *See id.*

²⁷⁷ National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111-84, § 506(b)(2)(B), 123 Stat. 2190 (2009).

²⁷⁸ Wounded Warrior Act, Pub. L. No. 110-181, § 1612(b)(2)(F), 122 Stat. 430, 430 (2008).

disability ratings.²⁷⁹ Although the IDES is complicated and still undergoing refinement, for purposes of this report, it can be summarized as follows.

The IDES begins when a qualified medical care provider determines that a WII service member cannot be returned to a full duty status as the result of an unresolved medical condition or residual impairments which bring into question the member's fitness for continued military service. In such circumstances, the medical care provider formally refers the service member into the IDES and the service member is assigned a DoD Physical Evaluation Board Liaison Officer (PEBLO) and a VA Military Service Coordinator (MSC) case manager.²⁸⁰

The next major milestone is the convening of a Medical Evaluation Board (MEB). MEBs are composed of at least two physicians and are held at the local Medical Treatment Facility (MTF).²⁸¹ The purpose of a MEB is to "render a decision on whether the service member's fitness for continued military service is questionable because of physical or mental impairment," and if so questionable, to fully document the nature and extent of the conditions that cause the service member to fail to meet retention standards.²⁸² The MEB prepares a report, which is provided to the PEBLO and the service member.²⁸³ The service member is provided an opportunity to submit material in rebuttal to the MEB report and to obtain an impartial medical review.²⁸⁴ If the MEB finds that the service member does not meet medical retention standards,

²⁷⁹ U.S. Dep't of Defense, Office of the Under Sec'y of Defense for Personnel and Readiness, *Integrated Disability Evaluation System (IDES) Operations Guide*, § 1.1 (Sep. 2010) [hereinafter *IDES Operations Guide*]. The *IDES Operations Guide* is in draft form, but is being used currently by all the Services. As a general matter, disability ratings are used to determine the level of financial compensation and benefits provided to a veteran by the Veterans' Association (VA), and the amount of disability severance pay or disability retirement pay and benefits provided to a service member by the DoD. *Id.* § 1.4. Under the IDES, as a general matter, the DoD must follow the ratings as determined by the VA. *See id.* § 3.4.

²⁸⁰ *Id.* enclosures (3), (7). In addition, as discussed *infra* in Section III.D.5., Marines referred to the IDES receive the assistance of legal counsel, in the form of an activated reserve Marine judge advocate. Sailors referred to the IDES may seek the assistance of legal counsel, in the form of an activated Navy reserve judge advocate or a Navy legal assistance attorney, and such counsel will be provided on an as-available basis. CAPT Michael I. Quinn, JAGC, USN, Assistant Judge Advocate General (Civil Law), Office of the Judge Advocate General, Transcript of October 13, 2010 Hearing, at 191 [hereinafter CAPT Quinn Testimony]; CAPT Michael I. Quinn, JAGC, USN, Assistant Judge Advocate General (Civil Law), Office of the Judge Advocate General, *Legal Support for the Disability Evaluation System*, 4, 9 (Oct. 13, 2010) [hereinafter CAPT Quinn Presentation].

²⁸¹ U.S. Dep't of Navy, *Manual of the Medical Department (MANMED)*, NAVMED P-117, art. 18-6, at 18-24 (Jan. 10, 2005) [hereinafter *MANMED*].

²⁸² U.S. Dep't of Navy, Sec'y of the Navy Instr. 1850.4E, *Department of the Navy (DON) Disability Evaluation Manual*, 10-2 (30 Apr. 2002) [hereinafter SECNAVINST 1850.4E].

²⁸³ *IDES Operations Guide*, *supra* note 279, enclosure (8).

²⁸⁴ *Id.*; *see also* *MANMED*, *supra* note 281, art. 18-3, at 18-18.

it forwards the complete case file to the DON Physical Evaluation Board (PEB) Administration.²⁸⁵

Assuming the MEB case file is complete as received by the DON PEB Administration, the next major step is the convening of an Informal Physical Evaluation Board (IPEB) to determine whether the service member's condition or conditions were incurred in the line of duty²⁸⁶ and whether they render the member unfit for continued service. The IPEB is convened by the President of the PEB and is held at the Washington Navy Yard in Washington, D.C.²⁸⁷ The IPEB is composed of a Navy medical officer and two line officers, one of whom is usually a Marine Corps officer.²⁸⁸ The IPEB conducts a documentary review without the presence of witnesses or the service member, and reports its findings to the PEB Administration.²⁸⁹

If the IPEB finds the service member unfit for duty based on one or more conditions, the PEB Administration submits that finding and the case file to the VA and requests that the VA prepare a proposed disability rating for each of the referred and claimed conditions.²⁹⁰ Assuming the case file is sufficient, the VA will rate the service member's referred and claimed conditions and provide a proposed rating decision to the PEB Administration.²⁹¹ The IPEB then takes the VA rating(s) and applies them to the service member's "military unfitting" condition(s).²⁹² When that is complete, the IPEB publishes its written decision and disposition recommendation

²⁸⁵ *IDES Operations Guide*, *supra* note 279, enclosure (8).

²⁸⁶ To be considered in the "Line of Duty" (LOD) there must be a nexus between an injury and duty status. SECNAVINST 1850.4E, *supra* note 282, § 3410 of enclosure (3). If the injury was not in the LOD, or was due to the member's own misconduct, the member may not be entitled to medical care for the injury at the military's expense, and may not be eligible to receive disability retirement or separation benefits. *Id.* The normal practice is for the parent command to make a decision that is considered binding on the Disability Evaluation System (DES) process. *Id.* However, if the Informal Physical Evaluation Board (IPEB) or Formal Physical Evaluation Board (FPEB) determines the command determination is contrary to the evidence on the record, the President of the PEB may forward the LOD determination to Director, Secretary of the Navy Council of Review Boards. SECNAVINST 1850.4E, *supra* note 282, § 3406 of enclosure (3); *MANMED*, *supra* note 281, art. 18-16(1), (7), at 18-24.

²⁸⁷ SECNAVINST 1850.4E, *supra* note 282, enclosure (10), at 10-2 to -3.

²⁸⁸ *Id.*

²⁸⁹ U.S. Dep't of Defense, Instr. 1332.38, *Physical Disability Evaluation*, ¶ E3.P1.3., at 16 (Nov. 14, 1996, incorporating Change 1, Jul. 10, 2006) (revised by Under Sec'y of Defense Memorandum, *Subj: Policy Memorandum on Implementing Disability-Related Provisions of the National Defense Authorization Act of 2008 (Pub. L. 110-181)*, ¶ E3.P1.3.2.2., at 2 (Oct. 14, 2008) [hereinafter USD Memorandum]).

²⁹⁰ *IDES Operations Guide*, *supra* note 279, enclosure (10).

²⁹¹ *Id.* enclosure (12).

²⁹² *Id.* enclosure (11).

to the PEBLO and to the service member.²⁹³ Upon receipt of the IPEB decision, the service member is entitled to the assistance of the DON counsel. The service member, with the advice of counsel, can appeal the IPEB decision to an Formal Physical Evaluation Boards (FPEB) and/or request a rating reconsideration from the VA.²⁹⁴

FPEBs are composed of three senior officers (usually in the pay-grade of O-6), including a Navy medical officer, a Navy line officer, and a Marine Corps officer.²⁹⁵ The service member is assigned a counsel for the proceedings. The service member and counsel may be present, and may present testimonial and documentary evidence.²⁹⁶ The FPEB determines whether the service member is fit for continued military service, and although it does not address specific VA disability ratings, it “must address decisions on ‘unfitting’ conditions and claimed conditions not deemed unfitting.”²⁹⁷ The FPEB issues its written findings to the service member and counsel.²⁹⁸

The service member, with advice of counsel, may then file a Petition For Relief (PFR) from an FPEB decision based on: new or newly discovered evidence; fraud, misrepresentation or misconduct; or a mistake of law. The decision to grant relief is determined by the Director, Naval Council of Personnel Boards, acting on behalf of the Secretary.²⁹⁹ The right to representation by military counsel extends through the PFR.³⁰⁰

2. New Requirement to Provide Counsel Following the Informal Physical Evaluation Board Decision

The *Wounded Warrior Act* requires the Secretary of Defense and the Secretary of Veterans Affairs to establish “uniform standards and procedures among the military departments

²⁹³ *Id.*

²⁹⁴ *Id.* With regard to VA ratings that did not concern unfitting conditions, the service member has separate procedural rights within the VA system, which he or she can exercise after separation from the Service. *Id.* enclosure (15). The service member is provided counsel by the military, and may, in addition or in lieu, obtain civilian counsel or a representative from a Veteran’s organization at his or her own expense. USD Memorandum, *supra* note 289, ¶ E8.2.2.2., at 21; *see also* SECNAVINST 1850.4E, *supra* note 282, § 4301(a) of enclosure (4) (“No active duty or reserve member of the naval service found Unfit by the Informal PEB may be retired or separated for physical disability without the right to a Formal PEB hearing.”).

²⁹⁵ SECNAVINST 1850.4E, *supra* note 282, enclosure (10), at 10-3.

²⁹⁶ *Id.*

²⁹⁷ *IDES Operations Guide*, *supra* note 279, enclosure (10). Changes in status between claimed conditions and unfitting conditions can affect disability compensation. *See id.* enclosure (12).

²⁹⁸ *Id.* enclosure (10).

²⁹⁹ SECNAVINST 1850.4E, *supra* note 282, enclosure (5).

³⁰⁰ USD Memorandum, *supra* note 289, ¶ E8.8., at 22.

for the provision of legal counsel to recovering service members while undergoing evaluation by a physical disability evaluation board.”³⁰¹ The Secretary of Defense implemented this mandate through the October 2008 Directive Type Memorandum (DTM), which provides in pertinent part:

Government legal counsel shall be available to consult (by telephone or otherwise) with a Service member regarding the Service member’s rights and elections following the Service member’s receipt of the decision of an Informal Physical Evaluation Board (IPEB). Military Departments may make legal counsel available to respond to inquiries by Service members earlier than receipt of the IPEB decision.³⁰²

The roles and responsibilities for the provision of counsel are also addressed in the DTM. The Secretary of the Military Department concerned, in coordination with the JAG, “shall . . . provide government counsel to advise and represent service members during the Physical Disability Evaluation (PDE) process (informal and formal Physical Evaluation Boards);”³⁰³ and the JAG, “shall assign sufficient numbers of trained legal counsel to advise and represent service members in proceedings before Physical Evaluation Boards.”³⁰⁴ Thus, the Secretary of the Navy is responsible for the provision of legal counsel to WWII Sailors and Marines as a general matter, and the JAG is responsible for assigning trained counsel to represent such Sailors or Marines at the post-IPEB and FPEB steps of the process.

The Assistant Judge Advocate General (AJAG) (Civil Law) advised the Panel that the new requirement to make legal counsel available upon receipt of an IPEB decision is being met through the activation of ten Navy reserve judge advocates dispersed at seven Navy shore installations.³⁰⁵ In addition, he noted that the Marine Corps activated four reserve judge

³⁰¹ Wounded Warrior Act, Pub. L. No. 110-181, § 1612(b)(2)(F), 122 Stat. 430, 430 (2008).

³⁰² USD Memorandum, *supra* note 289, ¶ E8.2.1., at 20.

³⁰³ *Id.* ¶¶ E8.1.-E.8.1.1., at 20.

³⁰⁴ *Id.* ¶ E.8.1.3.1., at 20.

³⁰⁵ CAPT Quinn Testimony, *supra* note 280, at 179; CAPT Quinn Presentation, *supra* note 280, at 4, 9. The Navy JAG’s calculations use the DON-approved man year standard of 1776 hours and are based on the FY 09 PEB case load of 6,227 DON cases, an average of 2.5 meeting per client and an average meeting time of 1 hour (6,227 X 2.5 X 1/1776 = 8.76 man years). CAPT Quinn Presentation, *supra* note 280, at 9; *see also* OPNAVINST 1000.16K, *supra* note 47, appendix C to enclosure (1). The Navy JAG then added 1.0 man year to account for outreach efforts conducted by the IPEB counsel. *See* CAPT Michael I. Quinn, JAGC, USN, *WII Analysis Spreadsheet* (16 Mar. 2010) [hereinafter *WII Analysis Spreadsheet*]; *see also* CAPT Quinn Testimony, *supra* note 280, at 190 (indicating that he would provide the Panel staff with a spreadsheet showing computations of work years).

advocates (two at Camp Lejeune and two at Camp Pendleton) to provide pre-IPEB and post-IPEB legal services to WII service members.³⁰⁶

The JAG advised the Panel that the Department of the Navy has programmed for 12 civilian attorneys to be hired to perform IDES legal services.³⁰⁷ Two civilians will support the FPEB process and the remaining ten will perform IPEB services, the latter as permanent replacements for the ten reserve U.S. Navy judge advocates now providing those services. The Panel heard testimony from the JAG and the AJAG (Civil Law) that employing civilian attorneys at the IPEB and FPEB levels was beneficial, as civilian counsel provide a level of continuity and corporate knowledge in a specialized and technical area of practice.³⁰⁸

3. New Training Requirements

The Department of Defense's implementation of the *Wounded Warrior Act* requires military departments to coordinate with their respective Judge Advocates General to "provide legal training programs to ensure government legal counsel participating in the [physical disability evaluation] process have adequate training in the PDE process and procedures."³⁰⁹ The DoD procedures introduce a new certification requirement for government counsel representing service members.³¹⁰ The Department of the Navy meets these requirements in three phases. First, at the Naval Justice School, all new accessions are given introductory training on Disability Evaluation Services (DES) requirements. Second, IPEB counsel are sent through a one-week training session at Naval Legal Service Office (NLSO) North Central (NC) where training is provided by counsel from the Wounded Warrior Regiment and the Navy's Safe Harbor program, and representatives from the Veteran's Administration, the Office of the Judge Advocate

³⁰⁶ CAPT Quinn Presentation, *supra* note 280, at 4.

³⁰⁷ See VADM Houck Testimony, *supra* note 107, at 115 (testifying that the Navy has programmed for the 12 civilian attorneys in the FY 12 Program Objectives Memorandum (POM)).

³⁰⁸ VADM Houck Testimony, *supra* note 107, at 117 (discussing the benefits of developing a corporate memory in a focused practice area); Mr. Robert C. Powers, President, Department of the Navy/Marine Corps Physical Evaluation Board (PEB), Transcript of October 13, 2010 Hearing, at 160-61 [hereinafter Mr. Powers Testimony] (discussing the complexity of the Veterans Administration Schedule for Rating Disabilities (VASRD)); CAPT Quinn Testimony, *supra* note 280, at 193 (discussing how the investment and corporate knowledge is lost when judge advocates transition to other positions).

³⁰⁹ USD Memorandum, *supra* note 289, ¶ E8.9.1., at 22.

³¹⁰ *Id.* ¶ E8.9.2., at 22. Paragraph E8.9.3 continues to discuss the content of the training program. *Id.* ¶ E8.9.3., at 22; see also CAPT Quinn Testimony, *supra* note 280, at 185-86 (acknowledging training requirements).

General, and the Navy's Bureau of Medicine.³¹¹ Counsel who have successfully completed this training are certified by the JAG or his designee. Finally, counsel for the FPEB are mentored and trained by more experienced counsel who have practiced before the boards.³¹² The Panel finds that Navy JAG's training program satisfies DoD requirements.

4. Provision of Legal Counsel at the Formal Physical Evaluation Board

Provision of counsel to represent WII service members at the FPEB is not a new requirement, and JAG currently provides two active-duty U.S. Navy judge advocates assigned to NLSO NC to represent Sailors and Marines during the FPEB and PFR process.³¹³ The JAG and the AJAG (Civil Law) advised the Panel that the DON plans to transition to two dedicated civilian counsel to provide FPEB and PFR services.³¹⁴

In response to the *Wounded Warrior Act*, the DoD has also implemented new policies regarding FPEB attorney caseload and FPEB processing timelines. In combination, those new policies may require that an additional counsel be made available to represent WII service members during the FPEB and PFR levels. With regard to attorney caseload, the new policy provides: "Normally, government legal counsel will not be assigned an overall caseload which requires them to represent more than ten (10) Service members per week at [FPEB] hearings."³¹⁵ Currently, the DON holds an average of 14 FPEB hearings per week, which means that dedicating two counsel to FPEB practice complies with the DoD attorney caseload policy.

With regard to the DoD policy on FPEB processing timelines, there is some confusion between the standards published in the October 2008 Directive Type Memorandum and the

³¹¹ CAPT Quinn Testimony, *supra* note 280, at 185-86; CAPT Quinn Presentation, *supra* note 280, at 7.

³¹² CAPT Quinn Testimony, *supra* note 280, at 187; CAPT Quinn Presentation, *supra* note 280, at 7.

³¹³ CAPT Quinn Testimony, *supra* note 280, at 179-80; CAPT Quinn Presentation, *supra* note 280, at 7. The Navy JAG calculates the manpower requirement of two attorneys by using the DON approved work man-year standard of 1,776 hours and an average of 5.93 hours per FPEB. Based on 716 FPEBs per year this equates to 2.4 man-years (716 X 6/1776 = 2.4). See *WII Analysis Spreadsheet*, *supra* note 305; see also CAPT Quinn Testimony, *supra* note 280, at 190 (indicating that he would provide the Panel staff with a spreadsheet showing computations of work years). As with the IPEB counsel, the JAG intends to transition to civilian counsel for FPEB and PFR cases, beginning in FY 12. See CAPT Quinn Testimony, *supra* note 280, at 193 (discussing the transition to civilian counsel in 2012); CAPT Quinn Presentation, *supra* note 280, at 3 (listing 10 counsel for IPEBs and 12 total counsel for all PEBS, whether formal or informal).

³¹⁴ VADM Houck Testimony, *supra* note 107, at 115; see CAPT Quinn Testimony, *supra* note 280, at 179-80.

³¹⁵ USD Memorandum, *supra* note 289, ¶ E8.1.3.2., at 20.

September 2010 *Integrated Disability Evaluation System (IDES) Operations Guide*. The former provides specific processing goals for each step in the IDES process including a 40-day goal for FPEBs,³¹⁶ and the latter provides guidelines based on less specific IDES phases, including a 120-day goal for the overall PEB phase (which includes FPEBs).³¹⁷ Under either approach, however, the DON has concluded that it needs to increase the rate of FPEBS to at least 21 per week, which in turn will require the JAG to dedicate a third FPEB counsel to remain within the 10 cases per week per attorney standard.³¹⁸

Finally, regarding counsel requirements to support the PEB, the Panel notes that currently, one active-duty judge advocate is assigned to serve as counsel for the PEB itself. The President of the PEB told the Panel that he believes the DON could further improve its overall case processing times by adding two counsel to the PEB, for a total of three counsel.³¹⁹ The PEB President stated that he would use additional counsel to more expeditiously and thoroughly prepare FPEB decisions.³²⁰

5. Provision of Legal Counsel Prior to Informal Physical Evaluation Board Decision

While mandating that legal counsel be made available to service members upon receipt of IPEB decisions, the Under Secretary of Defense's policy memorandum also authorizes military departments to make legal counsel available earlier in the IDES process on a discretionary basis.³²¹ The Army and the Marine Corps exercise this discretionary authority by actively providing legal counsel to service members prior to the IPEB decision.³²² In contrast, the Navy and the Air Force make counsel available at those early stages on an as-available basis only.

The SJA to CMC has stated that providing Marines with legal representation early in the IDES process implements the Commandant's pledge to support wounded warriors and their

³¹⁶ *Id.* ¶ E3.P1.6.5., at 4.

³¹⁷ *IDES Operations Guide*, *supra* note 279, § 7.2.3.

³¹⁸ Interview by CAPT Patrick Neher, JAGC, USN, Staff, Independent Review Panel, with Mr. Robert Powers, President of the Department of the Navy/Marine Corps Physical Evaluation Board (Nov. 22, 2010).

³¹⁹ Mr. Powers Testimony, *supra* note 308, at 160, 167.

³²⁰ *Id.* at 167. One attorney already supports the boards in accordance with Navy instructions. See SECNAVINST 1850.4E, *supra* note 282, § 4309 of enclosure (4).

³²¹ USD Memorandum, *supra* note 289, ¶ E8.2.1., at 20.

³²² CAPT Quinn Testimony, *supra* note 280, at 191-92 (explaining U.S. Army practice).

families. The SJA to CMC further expounded on the Marine Corps' intent and purpose in providing legal counsel prior to the IPEB, stating,

Through the provision of legal counsel earlier in the process, the Marine Corps is able to shape the DES process making the outcome both more efficient and more accurate; resulting in more favorable results at the IPEB, fewer appeals of IPEB findings, and cutting the overall time in the system for the individual Marine. By positively influencing the outcome of the process through early involvement, the Marine Corps believes that our actions are more closely aligned not only with the NDAA, but also with the spirit and intent of Congress in taking the best care of our wounded warriors.³²³

LtCol Faerber, one of four U.S. Marine Corps Wounded Warrior Counsel, testified that the Marine Corps believes that both the individual Marine and the Marine Corps benefit from the early assistance of counsel in the IDES process. Early assistance of counsel enables the individual WII Marine to provide more timely and effective input into the IDES process. For example, legal representation by a Marine judge advocate who is geographically co-located with the Marine and his parent command allows for greater influence and communication with the command and the local Medical Treatment Facility (MTF) during the early stages of the IDES process. Obtaining early legal support results in the individual Marine receiving the best possible result, thus reducing appeals to the FPEB, and resulting in an earlier return of a fit Marine to his unit or discharge of an unfit Marine, either of which benefits the individual Marine and the Marine Corps.³²⁴

Currently, the Marine Corps is supporting the early provision of counsel through 4 activated reserve judge advocates, and expects to expand to 13 activated reserve judge advocates for the near term. However, the Marine Corps is currently studying and preparing a long-term

³²³ MajGen Vaughn A. Ary, Staff Judge Advocate to the Commandant of the Marine Corps, *Addendum to the 31 August 2010 Submission to the Independent Panel Review of Legal Requirements in the Department of the Navy*, ¶ 3 (Nov. 18, 2010) [hereinafter *MajGen Ary Addendum*]. Note: The advent of the wounded warrior model is very recent and no statistical information has been received by the Panel concerning its impact on IPEB appeals or overall processing timelines.

³²⁴ LtCol Peter C. Faerber, USMC, U.S. Marine Corps Wounded Warrior Counsel, Transcript of October 13, 2010 Hearing, at 195-96 [hereinafter *LtCol Faerber Testimony*].

strategy, which will likely include revised manning requirements, based in part on the demand signal experienced by the additional activated reserve judge advocates.³²⁵

The U.S. Navy does not actively seek to provide counsel to WII service members prior to IPEB decisions. However, the JAG has authorized the ten reserve U.S. Navy judge advocates assigned IPEB duties and all Navy legal assistance counsel to provide pre-IPEB legal services on a space-available basis.³²⁶

While the *Wounded Warrior Act*, as implemented, allows for the Navy and Marine Corps to pursue different approaches to providing counsel in the earliest stages of the IDES process, the controlling DoD policy memorandum places the ultimate responsibility for the provision of legal counsel on the Secretaries of the Military Departments. If the Secretary of the Navy were to implement a Department-wide policy to provide counsel to all WII service members at the earliest stages of the IDES, the Assistant Judge Advocate General (AJAG) (Civil Law) estimated that an additional four to six counsel would be required above and beyond the ten that the DON has already programmed to hire.³²⁷

The Panel concludes that the issue of providing legal counsel earlier than presently required, as practiced by the Marine Corps and Army, involves issues and policy implications beyond its mandate to examine judge advocate manning in the Department of the Navy. However, the Panel recommends that the issue be examined by the Department of Defense and the DON for the purposes of studying the balance of interests in providing early representation and to consider the implications of the Services providing different levels of legal support to injured service members.

³²⁵ MajGen Ary *Addendum*, *supra* note 323, ¶ 6; LtCol Faerber Testimony, *supra* note 324, at 195, 198.

³²⁶ CAPT Quinn Testimony, *supra* note 280, at 191-92 (“The Army is very proactive in this particular area . . . And also, most importantly, they have resourced and [sic] MEB outreach program. . . . [The Army] indicated that they had 42 [sic] civilian counsel and an equal number of paralegals that are going out to do specifically nothing but outreach, trying to get to those Soldiers earlier in the MEB process to provide them information.”); *see also* CAPT Quinn Presentation, *supra* note 280, at 9 (correctly listing number as 22 civilian counsel). The Air Force provides counsel in a manner similar to Navy. VADM Houck Testimony, *supra* note 107, at 115.

³²⁷ CAPT Quinn Testimony, *supra* note 280, at 193-94.

E. Review of Requirements for Military Justice

The Panel was directed to review the judge advocate requirements of the Department of the Navy for the military justice mission, including: (1) assignment policies, (2) training and education, (3) increasing complexity of court-martial litigation, and (4) the performance of the U.S. Navy and Marine Corps in providing legally sufficient post-trial processing of cases in general courts-martial (GCM) and special courts-martial (SPCM).³²⁸

In addition to the testimony and materials provided by the Judge Advocate General of the Navy (JAG) and the Staff Judge Advocate to the Commandant of the Marine Corps (SJA to CMC) to assist in its review of military justice requirements, the Panel received testimony from: CAPT Daniel E. O’Toole, JAGC, USN, Chief Judge, Department of the Navy; Colonel (Col) Peter B. Collins, USMC, Assistant Judge Advocate General of the Navy (Military Justice); and CAPT Michael J. Boock, JAGC, USN, Commanding Officer, Naval Justice School.

Military justice is a primary statutory mission of U.S. Navy and Marine judge advocates.³²⁹ To accomplish this mission, some judge advocates – particularly Staff Judge Advocates (SJAs) – provide legal support as command advisors, while others provide legal services as trial, defense, and appellate counsel; recorders; Article 32 investigating officers; review officers; and members of the trial and appellate judiciary. Figure I, below, illustrates the role of judge advocates throughout the military justice process, from report of the offense to final appeal.³³⁰

³²⁸ National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111-84, § 506(b)(2)(C), 123 Stat. 2190 (2009).

³²⁹ 10 U.S.C. §§ 801-946.

³³⁰ SJA = Staff Judge Advocate; A32 = Article 32, UCMJ Pretrial Investigation; A34 = Article 34, UCMJ Advice of Staff Judge Advocate; TC = Trial Counsel; DC = Defense Counsel; IO = Investigating Officer; CO = Commanding Officer; ARR = Arraignment; MJ = Military Judge; CR = Court Reporter (not a judge advocate); ROT = Record of Trial; SJAR = Staff Judge Advocate’s Recommendation; Rev = Review Officer; CAA = Convening Authority’s Action; NAMARA = Navy-Marine Corps Appellate Review Activity; NMCCA = Navy-Marine Corps Court of Criminal Appeals.

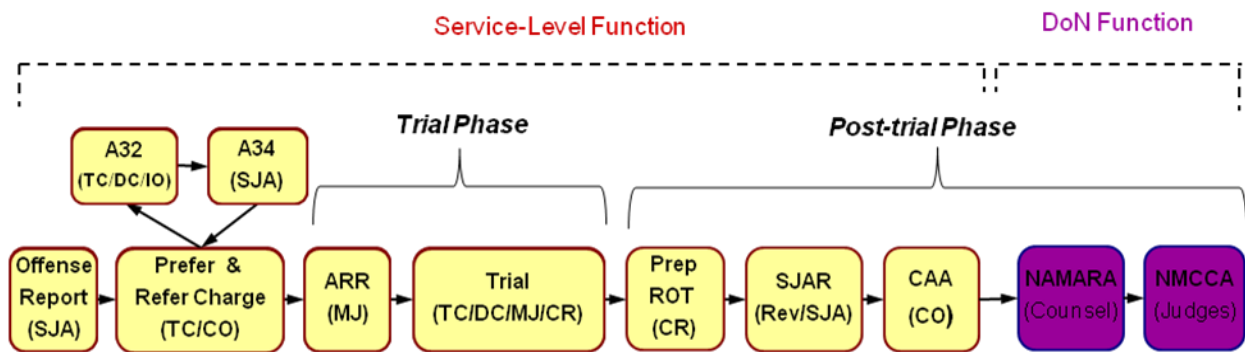


Figure I. Role of the Judge Advocate in the Military Justice Process

Generally, the number, training, and assignment of judge advocates to fulfill these roles within the military justice mission are driven by the dual demands of good order and discipline and individual due process rights. These demands manifest themselves in both the number and complexity of disciplinary and administrative actions, including: nonjudicial punishment; enlisted administrative separations; officer boards of inquiry; Article 32 investigations; and summary, special, and general courts-martial.

The Panel will first address the demand drivers of caseload and case complexity; we will then turn to the organization, education, training, and assignment of judge advocates for the provision of military justice services generally in the Department of the Navy, U.S. Navy, and Marine Corps. Finally, the Panel will address the post-trial processing of GCMs and SPCMs.

1. Caseload Statistics and Trends

Over the past 10 years, as depicted in Figure J and Table 11, below, there has been a significant decline in the total number of GCM and SPCM cases within the DON, from 2,809 cases tried in Fiscal Year (FY) 00 to 1,036 in FY 10.³³¹ The majority of the decline in the DON courts-martial caseload is attributable to a reduction in the number of SPCMs. By comparison,

³³¹ United States Court of Appeals for the Armed Forces, *Annual Reports of the Code Committee on Military Justice* (FY 00 – FY 09) [hereinafter *CAAF Annual Reports*] (compiling data for FY 00 through FY 09); Letter from CAPT Daniel E. O’Toole, JAGC, USN, Chief Judge, Department of the Navy, to Mr. Daniel J. Dell’Orto, Chairman, Independent Review Panel to Study the Judge Advocate Requirements of the Department of the Navy (Ser 05/0022) (Oct. 14, 2010).

the DON's GCM caseload has declined more slowly since FY 00, and the total appears to have stabilized beginning in FY 06.

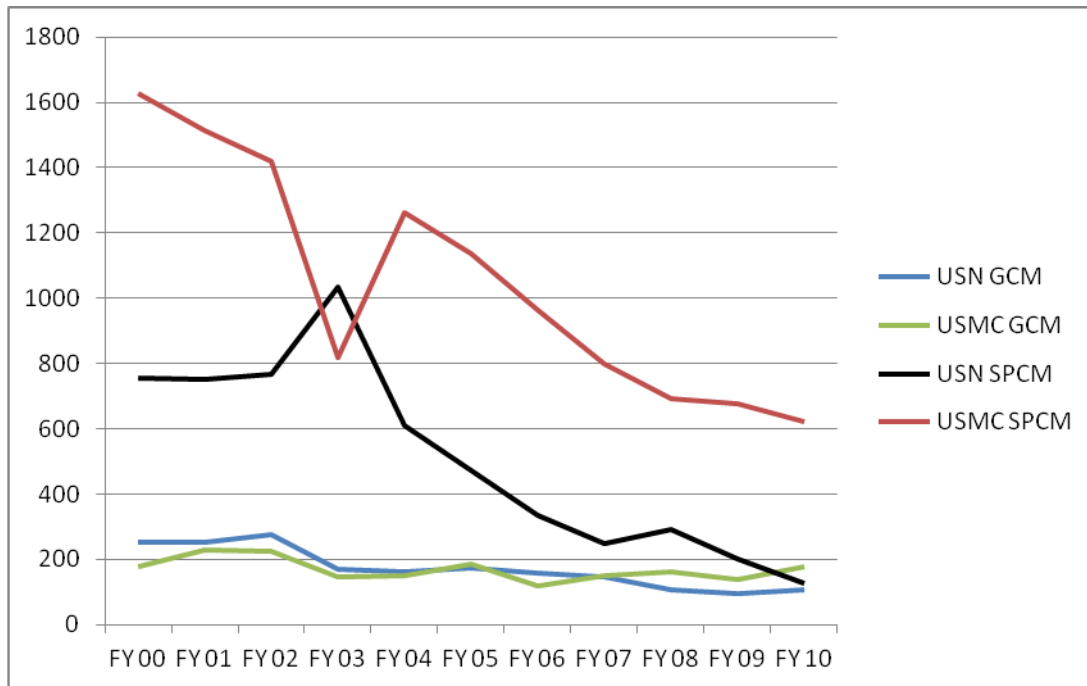


Figure J. The DON Caseload Trend

FISCAL YEAR/ SERVICE	TOTAL CASES TRIED	GCM		SPCM	
		No.	% DON	No.	% DON
FY 00 DON	2809	428	15%	2381	85%
USN	1007	252	59%	755	32%
USMC	1802	176	41%	1626	68%
FY 01 DON	2745	481	18%	2264	82%
USN	1005	254	53%	751	33%
USMC	1740	227	47%	1513	67%
FY 02 DON	2687	499	19%	2188	81%
USN	1045	276	55%	769	35%
USMC	1642	223	45%	1419	65%
FY 03 DON	2169	315	15%	1854	85%
USN	1206	170	54%	1036	56%
USMC	963	145	46%	818	44%
FY 04 DON	2185	313	14%	1872	86%
USN	774	163	52%	611	33%
USMC	1411	150	48%	1261	67%
FY 05 DON	1969	359	18%	1610	82%
USN	645	172	48%	473	29%
USMC	1324	187	52%	1137	71%
FY 06 DON	1577	278	18%	1299	82%
USN	493	158	57%	335	26%
USMC	1084	120	43%	964	74%
FY 07 DON	1346	297	22%	1049	78%
USN	397	148	50%	249	24%
USMC	949	149	50%	800	76%
FY 08 DON	1253	269	21%	984	79%
USN	398	106	39%	292	30%
USMC	855	163	61%	692	70%
FY 09 DON	1112	234	21%	878	79%
USN	297	94	40%	203	23%
USMC	815	140	60%	675	77%
FY 10 DON	1036	286	28%	750	72%
USN	235	108	38%	127	17%
USMC	801	178	62%	623	83%

Table 11. The DON Caseload Totals

Several points about the caseload within each Service merit note. First, the Marine Corps has historically prosecuted more SPCMs than the Navy, generally at about twice the rate. Second, as the number of SPCMs in the Marine Corps has declined over the last decade, the disciplinary actions disposed of at summary court-martial (SCM) and by nonjudicial punishment (NJP) under Article 15, Uniform Code of Military Justice (UCMJ), have increased over that same period. In fact, though SPCMs had declined from 1,626 in FY 00 to 692 in FY 08, the total number of Marine Corps misconduct cases disposed of at NJP, SCMs, and SPCMs remained virtually the same in FY 00 (12,242) and in FY 08 (12,490).³³² This zero-sum correlation suggests that within the Marine Corps, rates of reported misconduct have stayed relatively constant; however, the rate at which they are disposed of at particular forums has changed, possibly reflecting a change in disposition philosophy. Third, while there are indications that NJP, SCMs, and administrative separation boards may have recently begun to increase within the U.S. Navy, this trend is less pronounced than in the Marine Corps; indeed, over the last decade, the U.S. Navy trend reflects an overall decline.³³³

Other than a direct numerical correlation in the Marine Corps between declining SPCMs and the increasing use of alternative non-judicial dispositions, there is little empirical evidence that explains the caseload trends, or its changing composition. However, in the view of several senior military commanders and experienced military justice practitioners, there are a number of factors that appear to be driving these trends. These factors include:

- an increase in the jurisdictional maximum punishment at SPCMs from six months to one year;³³⁴
- higher quality of recruits in both Services;³³⁵

³³² Col Peter B. Collins, USMC, Assistant Judge Advocate General of the Navy (Military Justice), Navy-Marine Corps Appellate Review Activity, *Brief to the Independent Review Panel to Study the Judge Advocate Requirements of the Department of the Navy*, 23-25 (Oct. 6, 2010) [hereinafter Col Collins Presentation].

³³³ *Id.* at 22-25.

³³⁴ Exec. Order No. 13262, 67 Fed. Reg. 18773 (Apr. 11, 2002) (amending Rule for Courts-Martial (R.C.M.) 201(f)(2)(B)). This amendment may also account for the drop in the number of GCMs in 2003, as some cases that might otherwise have been disposed of by a GCM were instead disposed of at SPCM due to the newly enhanced confinement authority. See Neil Carey et al., Center for Naval Analyses, *An Analysis of Navy JAG Corps Future Manpower Requirements, Part 1: RLSOs and NLSOs*, 50 (Feb. 2008) [hereinafter CNA Manpower Study, Part 1].

³³⁵ VADM Houck Testimony, *supra* note 107, at 83; MajGen Ary Testimony, *supra* note 242, at 361-63.

- cultural shift among U.S. Navy line commanders serving as convening authorities, wherein they began opting to use administrative processes rather than courts-martial to dispose of misconduct, forcing problem Sailors out of the Navy;³³⁶
- for some time, the Marine Corps Legal Services community has been educating commanders about the lengthy post-trial review process required in special courts-martial cases in which a bad-conduct discharge is awarded, and its associated impact on unit manning;³³⁷ and
- the high operational tempo since 2002 has placed heavy demands on time and resources, reinforcing the shift to lower forum resolutions, which typically require less time and fewer resources to adjudicate.³³⁸

Despite the downward trend in the total number of courts-martial in the DON, military justice remains an essential mission for DON judge advocates. As already noted, the number of disciplinary cases initiated in the DON has remained relatively consistent over the course of the last decade.³³⁹ Even though many of these “cases” are ultimately disposed of at alternative forums rather than by court-martial, they still require the services of judge advocates. As the SJA to CMC stated in the *U.S. Marine Corps Military Justice Report for FY 2010*, “Although overall court-martial numbers and, particularly, special court-martial numbers declined, there appear[s] to be no corresponding reduction in the demand for military justice resources and expertise.”³⁴⁰

³³⁶ CNA Manpower Study, Part 1, *supra* note 334, at 53.

³³⁷ In accordance with Article 66, UCMJ, cases in which a bad-conduct discharge is adjudged are sent for review to the Navy-Marine Corps Court of Criminal Appeals (NMCCA), 10 U.S.C. § 866, where the appellate review process takes months. In accordance with Article 71(c), UCMJ, only after final appellate review may a punitive discharge be ordered executed. *Id.* § 871(c). Meanwhile, these Marines remain in an appellate leave status, creating a “lost-battalion” of Marines, performing little service to the Corps, but costing the Marine Corps needed manpower and litigation resources. Col Ralph F. Miller, *The Lost Battalion: Courts-martial for Minor Offenses is a Strain on Precious Resources*, Marine Corps Gazette, Jan. 2007, at 53-54 (urging commanders to consider disposing of minor misconduct cases at these lesser forums (e.g., NJP, SCM, administrative separation) and trumpeted the cost and time savings to be gained from so doing).

³³⁸ VADM Houck Testimony, *supra* note 107, at 83-87.

³³⁹ Even in the U.S. Navy, which has experienced a larger decline in courts-martial, the total number of misconduct cases disposed of at all forums exceeded 12,000 in FY 09. See VADM Houck Presentation, *supra* note 4, at 33.

³⁴⁰ USMC Military Justice Report 2010, *supra* note 226, at 3.

Military defense counsel provide advice to Sailors and Marines notified of processing for administrative separation and to Sailors and Marines notified of a commander's intent to impose nonjudicial punishment.³⁴¹ Military defense counsel are also assigned to represent respondents at Administrative Separation Boards and Boards of Inquiry (officer administrative separation boards), while trial counsel (prosecutors) are responsible for a significant amount of administrative work associated with these alternative forums, including serving as recorders (government representative).

2. Case Complexity

Although the overall trend for courts-martial has been shifting from higher forums (GCMs and SPCMs) to lower forums (SCM, NJP, and administrative separation boards), the number of cases referred for trial by GCM has declined less than the number of SPCM cases, and the complexity of those cases that are proceeding to trial has increased. There is no formal, legal, or doctrinal definition of "case complexity." For purposes of this review, the Panel considered that a wide range of factors, either standing alone or in combination, could make a case sufficiently complex to merit special consideration. Indicators of case complexity include:³⁴²

- number and gravity of the charges and specifications alleged;
- number and location of witnesses;
- necessity for expert witnesses and consultants;
- requirement for scientific evidence, such as computer or other forensic analysis;

³⁴¹ See U.S. Dep't of Navy, Judge Advocate General Instr. 5800.7E, *Manual of the Judge Advocate General*, ¶¶ 0109, 0119 at 1-15, 1-30 to -31 (20 Jun. 2007) [hereinafter *JAGMAN*]. In accordance with the *JAGMAN*:

There is no right for an accused to consult with counsel prior to nonjudicial punishment; however, [Commanding Officers] are encouraged to permit an accused to so consult subject to the immediate availability of counsel, the delay involved, and operational commitments or military exigencies. Failure to provide the opportunity for an accused to consult with counsel prior to nonjudicial punishment does not preclude the imposition of nonjudicial punishment; it merely precludes the admissibility of the record of nonjudicial punishment in aggravation at a later court-martial, unless the accused was attached to or embarked in a vessel at the time of the imposition of nonjudicial punishment.

Id. ¶ 0109, ¶ a.(1), at 1-15.

³⁴² See USMC SAP, *supra* note 42, at 19-20; see SJA to CMC Submission, *supra* note 38, at 27; see USMC Military Justice Report 2010, *supra* note 226, at 20.

- challenging chain-of-custody evidentiary issues in cases involving multiple agencies and jurisdictions; and
- whether media interest is anticipated.

The JAG and the SJA to CMC noted the increased complexities presented by child pornography cases (which require detailed understanding of computer forensics) and sexual assault cases (which require a thorough understanding of the complex statutory construction of Article 120, UCMJ).³⁴³ Additionally, concurrent with the DON's increased operational tempo over the past decade, there have been a number of complex, high-profile cases involving national security (espionage and disclosure or mishandling of classified information) and allegations of law of war violations.³⁴⁴

In view of the need to effectively and efficiently prosecute and defend complex cases, both Services must have sufficiently trained and experienced litigators, supervisory attorneys, and judges. Maintaining this cadre of experienced personnel is increasingly difficult in an environment in which there are fewer, less complex SPCMs involving relatively minor misconduct, and fewer cases overall, on which judge advocates may gain experience and maintain their perishable litigation skills.³⁴⁵ This issue is particularly challenging for the U.S. Navy, which litigates approximately one-third as many cases as the Marine Corps, nearly half of which are GCMs.

Having reviewed the military justice system and the inputs which drive requirements – caseload and case complexity – the Panel turns to a review of how the Department and its two Service components organize, educate, train, and assign their judge advocates to fulfill these requirements.

³⁴³ VADM Houck Testimony, *supra* note 107, at 88 (defining complex cases as including “child pornography cases . . . computer crime cases . . . child pornography; sexual assault; sodomy; murder; all cases that involve, for example, forensics, the dependence on forensics.”); MajGen Ary Testimony, *supra* note 242, at 276 (noting that cases have become more complex, in that they now include computer crimes and sexual assault cases that have high-visibility at the Congressional and the media level, which require strong evidentiary skill sets); *see also USMC Military Justice Report 2010*, *supra* note 226, at 20.

³⁴⁴ *See USMC Military Justice Report 2010*, *supra* note 226, at 20.

³⁴⁵ *See VADM Houck Testimony*, *supra* note 107, at 89-94.

3. Military Justice Organization

a) Department of the Navy

The Department-level military justice organization consists primarily of the Navy-Marine Corps Trial Judiciary (NMCTJ) (trial level courts); the Navy-Marine Corps Court of Criminal Appeals (NMCCA) (court of first appeal); the Navy-Marine Corps Appellate Review Activity (NAMARA), which includes the Appellate Government and Defense Divisions; and the leadership offices of the Assistant JAG (Military Justice) and the Assistant JAG (Chief Judge).

The NMCTJ is a unified judiciary that provides military trial judges to preside over all special and general courts-martial convened in the DON.³⁴⁶ The NMCTJ is composed of the Office of the Chief Judge of the NMCTJ and six Judicial Circuits. The NMCTJ is currently composed of 9 Navy and 14 Marine Corps trial judges.³⁴⁷

The NMCCA conducts appellate review, unless waived by the appellant, of all courts-martial of members of the naval Service referred to the court pursuant to Articles 62, 66, 69, and 73, UCMJ. In addition, when necessary in furtherance of its jurisdiction, NMCCA reviews all petitions for extraordinary relief properly filed before it.³⁴⁸ The NMCCA is currently composed of six Navy and three Marine Corps appellate judges.³⁴⁹

The Chief Judge, Department of the Navy, is a new AJAG position (established by the Secretary of the Navy on December 18, 2007) with primary administrative and supervisory responsibility over both the trial and appellate judiciaries. The Chief Judge is the reporting senior for the Chief Judge of the NMCTJ and all of the judges of the NMCCA.³⁵⁰

³⁴⁶ U.S. Dep't of Navy, Sec'y of the Navy Instr. 5400.40A, *Mission, Organization, Functions, and Support of Navy-Marine Corps Trial Judiciary*, ¶ 3., at 1 (Dec. 16, 2005) [hereinafter SECNAVINST 5400.40A].

³⁴⁷ CAPT Daniel E. O'Toole, JAGC, USN, Chief Judge, Department of the Navy, *Presentation to Independent Review Panel created under Section 506 of the Fiscal Year 2010 National Defense Authorization Act*, 18 (Oct. 6, 2010) [hereinafter CAPT O'Toole Presentation].

³⁴⁸ 10 U.S.C. §§ 862, 866, 869, 873.

³⁴⁹ VADM Houck Presentation, *supra* note 4, at 24.

³⁵⁰ U.S. Dep't of Navy, Judge Advocate General Notice 5450, *Mission and Function of Assistant Judge Advocate General, Chief Judge of the Department of the Navy*, ¶ 3.a.(1)-(2), at 1-2 (May 24, 2010) [hereinafter JAGNOTE 5450].

NAMARA is comprised of an Administrative Support Division, Appellate Government Division, and Appellate Defense Division.³⁵¹ The Appellate Government and Appellate Defense divisions within NAMARA are staffed by 12 U.S. Navy judge advocates and 11 Marine judge advocates.³⁵² Both divisions are led by O-6 division directors with extensive litigation experience. To maintain continuity and level of expertise, each division also has a civilian deputy director.

The AJAG (Military Justice) has primary supervisory responsibility for the execution of the JAG's statutory Departmental duties in military justice and related matters other than the judiciary. The AJAG (Military Justice) serves as the Officer-in-Charge, NAMARA; as such, he is responsible for the administrative review of records of trial, monitoring of post-trial appellate proceedings, supervising final action upon completion of appellate review, and ultimately archiving all records of trial received.

b) U.S. Navy

The Naval Legal Service Command (NLSC) field organization is comprised of Region Legal Service Offices (RLSOs) and Naval Legal Service Offices (NLSOs) and their subordinate activities. There are eight NLSOs, which are organized to provide an array of legal services, including court-martial defense services and legal assistance.³⁵³ NLSO defense counsel provide representation of Sailors and Marines at GCMs and SPCMs, as well as other advice and representation.³⁵⁴ The nine RLSOs provide a range of legal services to Navy commands, including trial counsel services to convening authorities in the prosecution of courts-martial and

³⁵¹ U.S. Dep't of Navy, Judge Advocate General Instr. 5400.1A, *Office of the Judge Advocate General (OJAG) Organization Manual*, ¶ 107.a., at 1-16 (6 Jul. 1992) [hereinafter JAGINST 5400.1A]. Note: JAGINST 5400.1A was updated by Change Transmittal 1 on April 23, 2003, but that change did not affect the propositions for which it is cited in this report.

³⁵² Col Collins Presentation, *supra* note 332, at 27.

³⁵³ See U.S. Dep't of Navy, Commander, Naval Legal Service Command Instr. 5800.1F, *Naval Legal Service Command (NLSC) Manual*, ¶ 0300, at 3-1 (Oct. 6, 2010) [hereinafter COMNAVLEGSVCCOM 5800.1F]. Naval Legal Service Offices (NLSOs) also provide personnel claims services, other claims and civil litigation, and command administration. *Id.*

³⁵⁴ *Id.* ¶ 1100, at 11-1. NLSO services also include Article 32 hearings, pretrial confinement proceedings, boards of inquiry, administrative boards, and proceedings in which service members have been designated a party pursuant to the *JAGMAN*. *Id.* Additionally, defense counsel provide required counseling of rights prior to NJP and SCM. See *id.*

command services to U.S. Navy commands lacking dedicated staff judge advocates.³⁵⁵ As of September 1, 2010, there were 54 U.S. Navy judge advocates serving as trial counsel in RLSOs and 82 serving as defense counsel in NLSOs.³⁵⁶

The Deputy JAG of the Navy serves as the Commander, NLSC. Commander, NLSC is authorized to organize, assign, and reassign responsibilities within the NLSC, including the establishment and disestablishment of its branch offices as necessary.³⁵⁷ In addition, Commander, NLSC is responsible for the administration of legal services, providing direction for all NLSC activities and resources assigned, and performing such other tasks and functions as directed by the Chief of Naval Operations.³⁵⁸

The existing alignment of NLSC is undergoing transformation for a variety of reasons, including the desire to improve oversight and accountability of RLSOs and NLSOs, to improve the timeliness and quality of technical support provided to trial and defense counsel in the field, and to enhance the independence of the defense function.³⁵⁹ In addition, the JAG is considering transitioning to an independent Trial Defense Command (TDC) with a potential target date of October 2012.³⁶⁰ These initiatives are discussed further below.

On July 1, 2010, Commander, NLSC, stood up a Defense Counsel Assistance Program (DCAP). The mission of the DCAP is to support NLSOs by providing advice and assistance to trial defense counsel in the field when requested throughout every phase of court-martial litigation.³⁶¹ DCAP provides a full spectrum of privileged and confidential trial advice, resourcing, and expert witness assistance, training, and other defense bar services for counsel in

³⁵⁵ See *id.* ¶ 0301, at 3-1. Region Legal Service Office (RLSO) services also include: command services/administrative law; court reporting; international law (overseas RLSOs); ethics counseling; foreign criminal jurisdiction (overseas RLSOs); legal assistance and/or claims services, when necessary to meet the needs of the Navy; and command administration. *Id.* The mission of the RLSO trial department is to provide qualified trial counsel for the prompt, efficient, and professional prosecution of SPCMs and GCMs; government counsel for the conduct of Article 32 pretrial investigations; and counsel (recorders) for administrative boards. *Id.* ¶ 1400, at 14-1.

³⁵⁶ VADM Houck Presentation, *supra* note 4, at 24. These officers, although identified as trial counsel or defense counsel, also provide command services and legal assistance, respectively.

³⁵⁷ OPNAVINST 5450.189B, *supra* note 34, ¶ 5., at 2.

³⁵⁸ COMNAVLEGSVCCOM 5800.1F, *supra* note 353, ¶ 0101, at 1-1.

³⁵⁹ See VADM Houck Testimony, *supra* note 107, at 99-108.

³⁶⁰ VADM Houck Testimony, *supra* note 107, at 99-100; VADM Houck Presentation, *supra* note 4, at 36.

³⁶¹ COMNAVLEGSVCCOM 5800.1F, *supra* note 353, ¶ 1200, at 12-1.

the field.³⁶² Serving as the military justice subject matter expert on defense-related matters for Commander, NLSC, “DCAP counsel may be consulted to provide support to trial defense counsel in all aspects of case preparation, including, but not limited to, motion drafting, expert witness preparation, devising trial strategy, assisting with post-trial matters, and providing advice concerning professional responsibility issues.”³⁶³

On October 1, 2010, Commander, NLSC, established a Trial Counsel Assistance Program (TCAP) to support RLSOs by providing advice and assistance to trial counsel throughout every phase of court-martial litigation. The mission of the TCAP is to support RLSOs by providing advice and assistance to trial counsel, upon request, throughout every phase of court-martial litigation.³⁶⁴ Serving as the military justice subject matter expert on government-related matters for the Commander, NLSC, TCAP counsel “may be consulted to provide support to trial counsel in all aspects of case preparation, including, but not limited to, drafting charges and specifications, drafting motions, preparing expert witnesses, devising trial strategy, and assisting with post-trial matters.”³⁶⁵

Also effective October 1, 2010, the neutral position of Vice Commander, NLSC, was disestablished and replaced with separate Deputy Commanders for RLSOs and NLSOs.³⁶⁶ Each Deputy Commander will have served previously in command of a RLSO or NLSO, and each reports directly to Commander, NLSC.³⁶⁷

The JAG explained that this new alignment provides a greater degree of oversight over RLSOs and NLSOs, as well as enhances the independence of the defense function.³⁶⁸ In combination with the establishment of separate assistance programs for trial counsel and defense counsel, the JAG anticipates improvements in the quality and timeliness of the delivery of trial

³⁶² See *id.* ¶¶ 1200-1204, at 12-1 to -2.

³⁶³ *Id.* ¶ 1200, at 12-1.

³⁶⁴ *Id.* ¶ 1500, at 15-1.

³⁶⁵ *Id.*

³⁶⁶ VADM Houck Testimony, *supra* note 107, at 99-106; VADM Houck Presentation, *supra* note 4, at 36-37.

³⁶⁷ VADM Houck Testimony, *supra* note 107, at 99-106; VADM Houck Presentation, *supra* note 4, at 37.

³⁶⁸ VADM Houck Testimony, *supra* note 107, at 99-106; VADM Houck Presentation, *supra* note 4, at 37.

and defense services in the field, and improved accountability within the RLSO and NLSO chains of command.³⁶⁹

The JAG is also continuing efforts to implement a Military Justice Litigation Career Track (MJLCT) within the U.S. Navy JAG Corps. The purpose of the MJLCT is to ensure that, in the face of a declining caseload in the U.S. Navy, experienced litigators will be able to try courts-martial and serve in mentoring positions within the military justice community and on the bench.³⁷⁰ The JAG explained that the concept of an MJLCT had been under consideration in the Navy JAG corps for many years. The initial MJLCT concept focused on protecting the promotion opportunities for litigation experts while continuing to allow them to practice their specialty.³⁷¹ More recently, the scope and underlying rationale for an MJLCT have been modified due to the declining caseload.³⁷²

The military justice challenge facing the U.S. Navy JAG Corps today is that the total number of courts-martial has declined substantially, including, in particular, less serious cases, which used to make up the bulk of special courts-martial. Those less serious cases were the cases upon which newly reporting junior officers “used to cut their teeth.”³⁷³ Because the total number of courts-martial in the U.S. Navy has fallen significantly and the number of less serious cases tried at court-martial has fallen precipitously, there has been a dilution in trial advocacy opportunities, particularly at the junior officer level, and a reduction in overall litigation experience across the Navy JAG Corps community.³⁷⁴ And yet, the Navy JAG Corps must retain the capability to administer and try complex cases, such as capital cases, national security cases, and war crimes cases, in a timely and professional manner, under a military justice system in which judge advocates have responsibilities at every level of process, from initial investigation to final appeal.

³⁶⁹ VADM Houck Testimony, *supra* note 107, at 99-106; see VADM Houck Presentation, *supra* note 4, at 37.

³⁷⁰ See VADM Houck Testimony, *supra* note 107, at 93-94. The JAG Corps has also taken steps to better tap into the trial advocacy expertise resident within the reserve community to support Naval Legal Service Command. *Id.* at 95.

³⁷¹ VADM Houck Testimony, *supra* note 107, at 93 (during testimony about the Military Justice Litigation Career Track, observing that “this has been discussed in the Navy JAG Corps for at least 25 years, and the notion that . . . wouldn’t it be smart to have people that want to litigate and who are good at it continue to do it through the years and not have that be disadvantageous to them from a career standpoint?”).

³⁷² See *id.* at 94.

³⁷³ *Id.* at 89-91.

³⁷⁴ *Id.*

In the face of the declining courts-martial numbers, the JAG has re-evaluated the MJLCT and concluded that, while the MJLCT is still a key component in ensuring the professional and timely execution of the military justice mission, the MJLCT community will have to be sized to meet the current caseload and the MJLCT officers will also have to perform duties outside military justice. A summary of an interview between the JAG and a Panel member provides that:

The ultimate number of officers that will serve within MJLCT is still being determined as [the JAG] considers ways to realign the underlying support structures for military justice. In this regard, VADM Houck indicated the need to go forward cautiously and incrementally to avoid unintended consequences that might negatively impact the quality of military justice within DON. In the end, the cadre of MJLCT officers and billets will shrink to appropriately reflect the existing military justice caseload that has showed steady decline over the last several years. With growing pressure on DON budget and end strength, [the JAG] indicated that there was strong incentive to right size the force. The existing paradigm that Navy judge advocates start their careers in military justice will need to be changed to a paradigm where new Navy judge advocates are exposed to the practice of military justice for some period of time but not all or most start as military justice practitioners.

VADM Houck also stated that it is important to understand that while the primary function of a MJLCT billet will be military justice, it is not the only duties [sic] that an officer serving in that billet will perform.³⁷⁵

The JAG also advised the Panel that he is considering implementing a separate defense command within the U.S. Navy – a Trial Defense Command (TDC) – with a potential implementation date of October 2012. Conceptually, the legal assistance function now performed in NLSOs would be transferred to RLSOs. The TDC would be smaller than the current NLSO command structure, it would be populated by senior litigators, and it would focus exclusively on the defense function. RLSOs would become “the teaching hospitals” for newly accessioned judge advocates.³⁷⁶ The JAG concluded his testimony on the topic of an eventual

³⁷⁵ Summary of meeting between VADM James W. Houck, JAGC, USN, Judge Advocate General of the Navy, and Rear Admiral (upper half) (RADM) James E. McPherson, JAGC, USN (Ret.), Member, Independent Review Panel to Study the Judge Advocate Requirements of the Department of the Navy, of 23 Nov. 2010 [hereinafter VADM Houck/RADM McPherson Meeting of 23 Nov. 2010].

³⁷⁶ VADM Houck Testimony, *supra* note 107, at 107.

TDC by stating, “That’s under consideration. We have a lot of work to do to flesh that out and get it right, but that’s where we’re headed.”³⁷⁷

c) Marine Corps

The execution and supervision of the military justice mission in the Marine Corps is completely decentralized — carried out by Marine commanders and the judge advocates supporting them. Marine SJAs advise commanders and supervise the overall local military justice process. SJAs work directly for commanders and are part of a commander’s staff.

In support of commanders and their SJAs, military justice services are provided, in garrison, by consolidated legal offices on board major bases and installations, organized as Legal Service Support Sections (LSSS) and Law Centers. Each LSSS or Law Center serves multiple commanders (courts-martial convening authorities) and SJAs aboard their respective installations or in their respective regions. The Marine Corps has three active component LSSSs. The LSSS is part of the operational force, and is therefore an organic unit within their respective Marine Logistics Group (MLG). LSSSs are typically supervised by a senior lieutenant colonel judge advocate serving as the Officer-in-Charge. A fourth LSSS resides within Marine Forces Reserve.³⁷⁸ Additionally, the Marine Corps has 12 Law Centers. Law Centers are part of the supporting establishment, and are therefore organized under the cognizant SJA for the respective base or installation commander. The level of legal services support at these Law Centers varies by mission and local arrangement, but all Law Centers provide military justice services.

The LSSSs and Law Centers are responsible for the handling of all aspects of a military justice case from the time a request for legal services is submitted by the command through

³⁷⁷ *Id.* at 107-08. The Department of Defense Inspector General (DoD IG) recommended that the JAG establish a Chief Defense Counsel or equivalent position within the U.S. Navy. U.S. Dep’t of Defense, Inspector General, *Evaluation of Post-Trial Reviews of Courts-Martial within the Department of the Navy*, 61-62 (Dec. 10, 2010) [hereinafter DoD IG Report]. The DON responded by noting the alignment changes that have been recently implemented within NLSC. *Id.* at 62. The DoD IG, while supporting those alignment changes, found the DON comments to be only partially responsive to the DoD IG’s original recommendation. *Id.* The DoD IG continues to “recommend establishing a Chief Defense Counsel position with the authority and resources to manage and supervise the Navy defense function, including defense counsel and staff.” *Id.*

³⁷⁸ USMC SAP, *supra* note 42, at 7. The Reserve LSSS provides centralized management, administration, and command and control of the delivery of reserve component legal services to the Marine Corps total force. Although RLSSSs act in general support of the Total Force (both active and reserve), they are generally mobilized or activated to support active component requirements (e.g., augmenting an active component LSSS, augmenting a deploying active component unit, or filling a Joint Manning Document (JMD) requirement).

Service-level post-trial processing and forwarding, if necessary, to NAMARA for appellate review.

Within both LSSSs and Law Centers, there are review offices, which guide cases through the post-trial review process. The review office provides the initial review of the court-martial proceedings and prepares the post-trial documents in support of the SJA, who conducts a second legal review of the proceedings prior to making the SJA's Recommendation (SJAR) and preparing the Convening Authority's Action (CAA).³⁷⁹

Currently, 133 Marine judge advocates are assigned to billets dedicated solely to military justice (46 trial counsel, 48 defense counsel, 11 review officers, 11 appellate counsel, and 17 military judges). An additional 79 judge advocates are assigned as SJAs and Deputy SJAs – billets that, while not solely dedicated to military justice, include vital pretrial and post-trial roles in addition to non-military justice duties.³⁸⁰

In 1985, the Marine Corps created the Chief Defense Counsel (CDC) of the Marine Corps and a separate reporting chain for defense counsel. Within this organization, defense counsel are supervised by, and receive performance evaluations from, local Senior Defense Counsel and Regional Defense Counsel (RDC). The CDC, a Marine colonel, and the three lieutenant colonel RDCs provide individual defense counsel with a significant depth of military justice experience to meet the mission of defending Marines and Sailors free from influence of any commander.

In May 2010, the SJA to CMC stood up a Trial Counsel Assistance Program (TCAP) to enhance the resources available for Marine prosecutors. The program is currently staffed with one field-grade and one company-grade officer. In addition to training, TCAP provides resources to assist Marine litigators using a number of electronic tools, including a litigation support website containing practice advisories, a military justice blog, a motions bank, and other useful documents and links.

³⁷⁹ 10 U.S.C. § 834; Manual for Courts-Martial, United States, R.C.M. 1106 (2008) [hereinafter MCM].

³⁸⁰ MajGen Vaughn A. Ary, USMC, Staff Judge Advocate to the Commandant of the Marine Corps, *Brief to the Independent Review Panel to Study the Judge Advocate Requirements of the Department of the Navy*, 25 (Sep. 1, 2010) [hereinafter MajGen Ary Presentation].

4. Training & Education

All U.S. Navy, Marine Corps, and Coast Guard judge advocates attend the Basic Lawyer Course (BLC) at Naval Justice School (NJS) in Newport, Rhode Island. The BLC is a ten-week course offered three times per year. In FY 10, 136 students (Navy, Marine Corps, and Coast Guard judge advocates) attended the BLC.³⁸¹ The BLC curriculum includes instruction on criminal law, evidence, trial advocacy, procedure, operational law, legal assistance (e.g., family law, consumer law, estate planning, and immigration), and administrative law (e.g., administrative separations, ethics/standards of conduct, Freedom of Information Act, Privacy Act, JAGMAN investigations, relations with civil authorities, and grievances).³⁸² Trial advocacy has received consistent emphasis in the BLC curriculum over the years. Seminars concerning specific skills, such as direct and cross-examinations, are conducted as the class progresses, culminating in a mock trial that moves from pretrial motions practice to a closing statement in a National Institute for Trial Advocacy (NITA) format.³⁸³

The BLC is designed to meet the requirements for basic judge advocate qualification and certification as set forth in the UCMJ. Upon successful completion of the BLC, Navy and Marine judge advocates are certified to practice law as a judge advocate, including, specifically, as trial and defense counsel.

U.S. Navy and Marine judge advocates are also provided with continuing in-service training and education, as well as access to resources for the practice of military justice after leaving NJS. These resources include mentoring and training at local military justice offices, opportunities for continuing legal education courses, and advice and support at local and higher echelons of command. Judge advocates often return to NJS from the fleet or attend courses at the Army Judge Advocate General's Legal Center and School (TJAGLCS) in Charlottesville, Virginia, for further training as staff judge advocates and for specialized schooling in trial

³⁸¹ CAPT Michael J. Boock, JAGC, USN, Commanding Officer, Naval Justice School, Transcript of October 6, 2010 Hearing, at 151 [hereinafter CAPT Boock Testimony].

³⁸² CAPT Michael J. Boock, JAGC, USN, Commanding Officer, Naval Justice School, *Presentation to Panel created under Section 506 of the Fiscal Year 2010 National Defense Authorization Act*, 13-17 (6 Oct. 2010) [hereinafter CAPT Boock Presentation].

³⁸³ *Report on the State of Navy Military Justice 2009*, 2 (1 Jul. 2009).

advocacy, computer crimes, legal assistance, the law of military operations, and prosecuting and defending complex cases.³⁸⁴

5. Assignment Policies

a) Trial and Appellate Judiciary

The JAG has the authority to make assignments of U.S. Navy judge advocates to the trial and appellate judiciaries. Marine Corps assignments are made by Headquarters, Marine Corps (Manpower and Reserve Affairs, Officer Assignments) based on the recommendation of the SJA to CMC. Prior to being assigned to either the trial or appellate judiciaries, each officer must be certified by the JAG.³⁸⁵ Certification is accomplished through the recommendation of the Judicial Screening Board.³⁸⁶ The JAG, in conjunction with the Judicial Screening Board, endeavors to select officers who possess a suitable background in military justice, sound judgment, an even temperament, and exemplary writing skills for assignment to judicial billets.³⁸⁷

The Chief Judge, Department of the Navy (CJDON), makes recommendations to the JAG and the SJA to CMC on the billet structure and geographic location of judicial billets. In close coordination with the SJA to CMC regarding Marine judge advocates, the CJDON serves as the JAG's principal advisor on the assignment of military trial and appellate judges.³⁸⁸ Furthermore, judicial staffing is closely monitored in light of caseload.³⁸⁹

b) Appellate Counsel

Only those officers with previous experience as a trial or defense counsel may be detailed to the Criminal Law Division, the Appellate Government Division, or the Appellate Defense

³⁸⁴ See CAPT Boock Presentation, *supra* note 382, at 19-20. NJS offers 31 courses for attorneys, nearly half of which focus on some aspect of trial advocacy. NJS also offers specialized courses in military justice throughout the year in Newport, Rhode Island and at its Detachments in Norfolk, Virginia and San Diego, California.

³⁸⁵ 10 U.S.C. § 826.

³⁸⁶ U.S. Dep't of Navy, Judge Advocate General Instr. 5817.1D, *Judicial Screening Board*, ¶¶ 3.-4., at 1 (May 10, 2010) [JAGINST 5817.1D] (noting that the following personnel are designated as Board members: AJAG (Chief Judge); AJAG (Military Justice); Chief Judge, NMCCA; Chief Judge, Navy-Marine Corps Trial Judiciary; Deputy AJAG (Criminal Law); Deputy SJA to CMC).

³⁸⁷ *Id.* ¶ 3., at 1.

³⁸⁸ JAGNOTE 5450, *supra* note 350, ¶ 3.e., at 3.

³⁸⁹ VADM James W. Houck, JAGC, USN, Judge Advocate General of the Navy, Response to Panel Members' Request for Information #13 of Aug. 20, 2010, at 4-5 (providing a spreadsheet of PCS billets filled by U.S. Navy judge advocates outside of the DON in FY 10).

Division.³⁹⁰ Additionally, to enhance productivity of appellate counsel, officers are assigned to the Appellate Divisions for a minimum period of three years; the JAG must approve waivers of the three-year tour length requirement.³⁹¹

c) U.S. Navy

It is the policy of the JAG to assign the best and fully qualified judge advocate to every military justice billet.³⁹² Consideration is given to the volume and complexity of the military justice work load and the skill, training, experience, and pay grade of the officer to be assigned. New accession judge advocates are primarily assigned to RLSOs and NLSOs. All accessions are considered qualified for such assignments upon successful completion of the NJS Basic Lawyer Course.

The Navy JAG Corps strategic plan, *Navy JAG 2020*, committed to the establishment of “a career track enabling selected judge advocates to specialize in military justice litigation.”³⁹³ The plan anticipated that a cadre of seasoned litigators would “improve the quality of military justice litigation by keeping experienced and effective counsel in the courtroom, providing expert supervision and mentoring for new counsel, and creating a cadre of qualified judge advocates to fill selected billets in the military justice system.”³⁹⁴ The program was formally implemented in 2007 with the establishment of the Military Justice Litigation Career Track (MJLCT).³⁹⁵ The current MJLCT instruction identifies 52 billets that require assignment of officers who possess the qualifications set out in the instruction for a “specialist” or “expert” in litigation.³⁹⁶ These billets, generally aligned with geographic areas producing the most courts-martial, include some NLSC commanding officers and executive officers, senior trial counsel and defense counsel, as well as certain trial and appellate judges.³⁹⁷ Specialists and experts are

³⁹⁰ U.S. Dep’t of Navy, Judge Advocate General Instr. 1320.1, *Detailing Policy for Military Justice Billets*, ¶ 4.d., at 3 (Sep. 13, 2010).

³⁹¹ *Id.*

³⁹² *Id.* ¶ 4., at 1.

³⁹³ U.S. Navy Judge Advocate General’s Corps, *Navy JAG 2020*, 11 (undated).

³⁹⁴ *Id.*

³⁹⁵ U.S. Dep’t of Navy, Judge Advocate General Instr. 1150.2, *Military Justice Litigation Career Track* (May 3, 2007) (canceled by JAGINST 1150.2A, *supra* note 276).

³⁹⁶ JAGINST 1150.2A, *supra* note 276, enclosure (2).

³⁹⁷ *Id.*

selected through an administrative board process and then detailed to these designated billets.³⁹⁸ This community within the JAG Corps will have to be sized appropriately to meet a declining caseload that is comprised of nearly 50% GCMs. In this environment, where there are limited opportunities to develop litigation skills in less complex cases, consolidating litigation offices is expected to enhance the experience base of litigators, maintain their currency, and allow them to serve as mentors for new counsel.³⁹⁹

d) Marine Corps

Historically, the volume of courts-martial in the Marine Corps has exceeded that of the other Services. Over the past ten years, the Marine Corps tried an average of 31% of the total GCM and SPCM caseload in the Department of Defense. Even given the recent decline in numbers of GCMs and SPCMs, the Marine Corps continued to carry 28% of the overall DoD caseload in FY 09.⁴⁰⁰ Accordingly, the statutory military justice mission remains the primary core practice for Marine judge advocates. The preponderance of Marine judge advocates will be detailed as either trial counsel or defense counsel, and often both, during their first tour in the Corps.

While Marine judge advocates have the opportunity to try many cases and learn the mechanics of courts-martial early in their careers, today's Marine judge advocates typically lack the opportunity for long-term continuity in trial billets needed to truly refine their military justice expertise. One reason for this shortfall is the need to meet the demand for legal support during combat operations. Marine judge advocates have been assigned on an ad hoc, but continuous basis to temporary duty, for periods of between 7 and 13 months, to augment deploying Marine Expeditionary Forces (MEF) SJA offices and their subordinate commands (e.g., regiments and battalions) in support of OIF and OEF. These assignments demonstrate the flexibility of the Marine legal services community to effectively task-organize to support combat forces. However, it is important to note that the billets in support of OIF and OEF have been sourced primarily from the company-grade judge advocates serving in non-deployed Legal Service Support Sections (LSSSs) and supporting establishment Law Centers throughout the Marine

³⁹⁸ *Id.* ¶ 4., at 3-5.

³⁹⁹ VADM Houck/RADM McPherson Meeting of 23 Nov. 2010, *supra* note 375; *see also* JAGINST 1150.2A, *supra* note 276, ¶ 3.d., at 2.

⁴⁰⁰ *See generally* CAAF Annual Reports, *supra* note 331.

Corps, many of whom are serving as trial and defense counsel. This continuous turnover has decreased the amount of time, and continuity of service, for first tour company-grade judge advocates to gain experience and proficiency in military justice practice. Continuous rotation of personnel within a particular LSSS or Law Center has the potential to degrade the collective experience base and synergy typically resident, and critical, in a successful law office when new counsel practice alongside, and are mentored by, their more experienced peers.

This trend, coupled with the previously-noted increase in case complexity, led the Marine Corps to re-code judge advocate billets to identify areas in which specialized expertise is necessary. In 2005, the Marine Corps effected a change to the Military Occupational Specialty (MOS) Manual to add six additional “Necessary” MOSs (NMOS) for judge advocates, including 4409 – Master of Criminal Law.⁴⁰¹ Judge advocates holding the NMOS 4409 have a specialized understanding in technical and constitutional areas of criminal law and the UCMJ, and are eligible to serve in challenging billets requiring such expertise in military and criminal law issues. There are currently 26 billets coded for NMOS 4409. These billets are supervisory (e.g., senior trial counsel, military justice officer, senior defense counsel, and regional defense counsel) and must be filled by military justice experts with a Master of Laws (LL.M.) degree in criminal law or a proven history of military justice experience and expertise. A secondary effect of this re-coding is an increased opportunity for judge advocates to receive advanced degrees.

6. Post-Trial Processing of Special and General Courts-Martial

This review, along with the Department of Defense Inspector General (DoD IG) review,⁴⁰² was conducted in the wake of the case of *United States v. Foster*.⁴⁰³ Foster, a Marine Sergeant, was convicted of spousal rape, aggravated assault, and communicating a threat, and began serving a 17 year sentence to confinement on December 3, 1999. On February 17, 2009, the Navy-Marine Corps Court of Criminal Appeals (NMCCA) overturned the rape conviction based on legal and factual insufficiency. The Court went on to set aside the findings and sentence for the remaining convictions due to errors in the case and unacceptable delay, noting

⁴⁰¹ See MCO 1200.17B, *supra* note 116, ¶ 1127.6., at 1-141; see also Message 200004Z JUL 06, MARADMIN 329/06, *Subj: MOS Manual Changes and Conversions*.

⁴⁰² DoD IG Report, *supra* note 377, at 1.

⁴⁰³ *United States v. Foster*, 2009 CCA LEXIS 62 (N-M.C.C.A. Feb. 17, 2009).

that “the delay in this case ‘is so egregious that tolerating it would adversely effect [sic] the public’s perception of the fairness and integrity of the military justice system.’”⁴⁰⁴

a) Post-Trial Procedure

Once a court-martial is adjourned by the military judge, the post-trial process begins with the transcription and assembly of the record of trial by the court reporter. Trial and defense counsel then review the record of trial, followed by review and authentication of the record of trial by the military judge.⁴⁰⁵ The record of trial is then delivered to the Convening Authority (CA). Prior to the CA taking action on the case, the record is reviewed by the CA’s SJA, who provides an SJA’s recommendation (SJAR)⁴⁰⁶ to the CA, along with any clemency submissions by the accused or counsel.⁴⁰⁷ If the CA approves findings and a sentence⁴⁰⁸ including at least one year of confinement or a punitive discharge, the case is forwarded to Navy-Marine Corps Appellate Review Activity (NAMARA).⁴⁰⁹ Once at NAMARA, the record is reviewed for completeness before being forwarded for docketing at NMCCA.⁴¹⁰ Copies of the record are simultaneously provided to the Appellate Government and Appellate Defense Divisions.

b) Post-Trial Due Process Requirements

An appellant “has a constitutional right to a timely review guaranteed him under the Due Process Clause.”⁴¹¹ Military appellate courts have long recognized that appellate review under Article 66, UCMJ “embodies a concomitant right to have that review conducted in a timely fashion.”⁴¹² Speedy post-trial review includes the right to a timely Convening Authority’s Action (CAA), the prompt forwarding of the record of trial to appellate authorities, and reasonably timely consideration by military appellate courts. The Court of Appeals for the

⁴⁰⁴ *Id.* (quoting *United States v. Haney*, 64 M.J. 101, 108 n.36 (C.A.A.F. 2006) (quoting *United States v. Toohey*, 63 M.J. 353, 362 (C.A.A.F. 2006)).

⁴⁰⁵ MCM, *supra* note 379, R.C.M. 1103, 1104.

⁴⁰⁶ *Id.* at 1106.

⁴⁰⁷ *Id.* at 1105.

⁴⁰⁸ *Id.* at 1107.

⁴⁰⁹ *Id.* at 1111.

⁴¹⁰ U.S. Navy-Marine Corps Courts of Criminal Appeals, *Rules of Practice and Procedure and Internal Operating Procedures*, Rule 1.4, at 2 (1 Feb. 2010).

⁴¹¹ *Diaz v. Judge Advocate General of the Navy*, 59 M.J. 34, 38 (C.A.A.F. 2003).

⁴¹² *Id.* at 37.

Armed Forces (CAAF) has adopted the four factors set forth in *Barker v. Wingo*⁴¹³ “for reviewing post-trial delay due process claims”: (1) length of delay; (2) reasons for delay; (3) the appellant’s demand for speedy review; and (4) whether prejudice occurred as a result of the delay.⁴¹⁴

In 2006, CAAF decided the case of *United States v. Moreno*, which mandated a new methodology for review of post-trial delay cases.⁴¹⁵ The Court set forth benchmarks for various steps of the post-trial process, violations of which would trigger a presumption of unreasonableness. Post-*Moreno*, CAAF applies a presumption of unreasonable delay when the CAA is not taken within 120 days of a court-martial; when the record of trial is not docketed by the Service Court of Criminal Appeals within 30 days of the CAA; and when appellate review is not completed and a decision is not rendered within 18 months of docketing the case. If the length of the delay is “facially unreasonable,” an appellate court is required to balance the length of the delay against the other three *Barker v. Wingo* factors.⁴¹⁶ Each factor is weighed and balanced to determine if it favors the appellant or the Government, with no single factor being dispositive.

A review of the post-trial milestones in the *Foster* case shows that there were lapses at nearly every stage in the post-trial process, at both the Service and Department levels. Foster was sentenced on December 3, 1999. Two hundred and fifty days later, the military judge authenticated the record of trial. On February 9, 2001, 434 days after completion of the trial, the CA took action. It then took 291 days for the case to be docketed with the NMCCA.

The NMCCA granted 20 motions for enlargement of time to Foster’s appellate defense attorney before the defense brief was filed on December 19, 2003 (752 days from docketing). The Government filed an answer brief on August 16, 2004 (241 days from submission of Foster’s brief). Foster’s response was filed on September 10, 2004. On June 21, 2006 (649 days later), Foster filed a Motion for Expedited Review. On July 6, 2006, the NMCCA ordered a fact-finding *DuBay* hearing and returned the case to the CA. The record of trial, including the *DuBay*

⁴¹³ *Barker v. Wingo*, 407 U.S. 514, 530 (1972).

⁴¹⁴ *United States v. Moreno*, 63 M.J. 129, 135 (C.A.A.F. 2006) (citing *United States v. Jones*, 61 M.J. 80, 83 (C.A.A.F. 2005)); see also *Toohey v. United States*, 60 M.J. 100, 102 (C.A.A.F. 2004).

⁴¹⁵ *Moreno*, 63 M.J. at 136-39.

⁴¹⁶ *Id.* at 136.

hearing, was re-docketed with the NMCCA on June 12, 2007, after which Foster and the Government were permitted to file additional pleadings. All pleadings were filed by December 5, 2008. On February 17, 2009 – 9 years and 2 months (3,364 days) after the completion of trial – the NMCCA issued its decision.

7. Remedial Measures and Initiatives

In the wake of *Moreno* and *Foster*, both the Navy and the Marine Corps conducted comprehensive assessments of their legal communities. This Section describes some of the initiatives each Service instituted to correct the deficiencies that led to the failures in the post-trial processing mission.

a) Military Justice Oversight Counsel

In 2009, the JAG established the Military Justice Oversight Council (MJOC).⁴¹⁷ The MJOC is a flag/general officer forum for the review of military justice in the Navy and Marine Corps.⁴¹⁸ Membership includes the JAG, the Deputy JAG (Commander, Naval Legal Service Command (NLSC)), the SJA to CMC, the AJAG (Military Justice), and the Chief Judge, Department of the Navy (CJDON).⁴¹⁹ The MJOC meets monthly to review structural, resource, and other matters that affect the timely and effective delivery of military justice services, and includes review of requirements needed to process the caseload or individual cases.⁴²⁰ The *Evaluation of Post-Trial Reviews of Courts-Martial Within the Department of the Navy (DoD IG Report)* noted that, as presently established, the MJOC could be terminated at any time and successor Navy JAGs might choose not to continue the current commitment to military justice oversight.⁴²¹ To remedy this, a provision to formally establish the MJOC was included in a draft revision of Secretary of the Navy Instruction (SECNAVINST) 5430.27C, which is currently under review.⁴²²

⁴¹⁷ DoD IG Report, *supra* note 377, at 4.

⁴¹⁸ *Id.* at 182.

⁴¹⁹ *See id.* at 43.

⁴²⁰ One of the primary concerns noted in the DoD IG review was lack of oversight or supervisory mechanisms embodied in policy or institutionalized processes. *See id.* at 3.

⁴²¹ *Id.* at 53.

⁴²² *Id.* at 53, 182

b) Chief Judge, Department of the Navy

The position of the CJDON was approved by the Secretary of the Navy in December 2007.⁴²³ Prior to the establishment of this position, Article 66, Uniform Code of Military Justice, prohibited the Chief Judge of NMCCA from writing fitness reports on other members of the court.⁴²⁴ This prohibition had the unintended consequence of inhibiting active management of the NMCCA. Since the CJDON is not a sitting member of the Navy-Marine Corps Court of Criminal Appeals (NMCCA), the Article 66 prohibition no longer represents an impediment to the exercise of supervisory duties over the appellate judiciary. The duties and responsibilities of the CJDON include monitoring the productivity and timeliness of the trial and appellate judiciaries and taking administrative action consistent with the Code of Judicial Conduct as needed to ensure all judges perform their duties in a timely and effective manner.⁴²⁵ The CJDON is required to periodically report to the JAG any administrative impediment, such as a lack of resources, which might cause any case to fail to be processed in accordance with the standards of *Unites States v. Moreno*.

c) Annual Report on the State of Military Justice

On May 4, 2009, in response to the *Foster* decision, the JAG established a panel to conduct a review of the actions, policies, and procedures necessary to ensure the U.S. Navy JAG Corps is able to perform its military justice function in a competent, professional manner. The *Report on the State of Navy Military Justice 2009*, published on July 1, 2009, responded to that Charter. That report, however, was limited to the U.S. Navy JAG Corps and did not include a review of Marine Corps legal services. There is now an annual reporting requirement to conduct a comprehensive assessment of military justice practice across the DON, including the Marine Corps. The annual report will be

⁴²³ JAGNOTE 5450, *supra* note 350, ¶ 2., at 1.

⁴²⁴ See DoD IG Report, *supra* note 377, at 39.

⁴²⁵ JAGNOTE 5450, *supra* note 350, ¶ 3., at 1-5. "In the past, limited supervisory authority was asserted as a key problem in addressing less productive and less committed judges on the Court, a problem the new Chief Judge position should remedy." See DoD IG Report, *supra* note 377, at 39-40.

provided to the Secretary of the Navy, Chief of Naval Operations, and the Commandant.⁴²⁶ As the JAG testified on September 1, 2010,

I think, going forward, the vision would be different for that report, . . . that it would be . . . a collaborative effort between the two communities, but consistent with the JAG's responsibility to oversee Article 6, that that report would be submitted to the JAG [sic] to the Secretary, to the CNO and to the Commandant. But, clearly, the SJA to the Commandant would play a very big role, as would the Commander, Navy [sic] Legal Service Command in development of that report.⁴²⁷

d) Inspections⁴²⁸

In conducting inspections within the Navy, the JAG Inspector General (IG) has been directed to ensure that a subject matter expert in military justice will participate in every inspection of RLSO units, and provide a complete assessment of RLSO performance and compliance with statutory and regulatory requirements.⁴²⁹ Similarly, inclusion of appropriate subject matter expert participation will be scheduled for NLSO inspections and approved during the semi-annual IG program review.⁴³⁰ Additionally, as part of the inspection process, the JAG IG will conduct interviews of General and Special Courts-Martial Convening Authorities, SJAs, and members of the inspected commands regarding courts-martial process, including the level of NLSC leadership involvement and attendance at courts-martial.⁴³¹ To ensure the timeliness of processing of courts-martial, the JAG IG will also verify the status of the courts-martial tracking system at each inspected unit.⁴³²

⁴²⁶ *Id.* at 53. A draft revision to Secretary of the Navy Instruction 5430.27C, *Responsibility of the Judge Advocate General of the Navy and the Staff Judge Advocate to the Commandant for Supervision and Provision of Certain Legal Services*, currently under review, would institutionalize this annual reporting requirement. *Id.* at 53.

⁴²⁷ VADM Houck Testimony, *supra* note 107, at 415.

⁴²⁸ One of the primary deficiencies noted by the DoD IG was "ineffective inspections, which either did not detect/identify post-trial problems, or did not lead to sufficient or lasting corrective actions." DoD IG Report, *supra* note 377, at 2.

⁴²⁹ U.S. Dep't of Navy, Judge Advocate General Instr. 5040.1, *Uniform Code of Military Justice Article 6 Legal Office Assessments*, ¶ 8.d.(2), at 4 (Jun. 14, 2010).

⁴³⁰ *Id.*

⁴³¹ *Id.* ¶ 2. of enclosure (1), at 2.

⁴³² *Id.*

Marine Corps legal offices are now inspected by two primary means: the Commanding General's Inspection Program (CGIP)⁴³³ and SJA to CMC inspections. On May 15, 2010, an Automatic Inspection Reporting System (AIRS) checklist⁴³⁴ for command inspection of legal services was formally implemented.⁴³⁵ The AIRS checklist addresses each functional area within SJA offices, Law Centers, and LSSSs, including military justice, court reporters, and post-trial matters. Under this program, subject matter experts with the CGIP inspect SJA offices, Law Centers, and LSSSs to ensure compliance with standards and processing times.

Under authority granted by Secretary of the Navy Instruction, the SJA to CMC has the authority to "conduct annual inspections to ensure that Marine Corps law centers are functioning properly and efficiently."⁴³⁶ While these inspections historically included some assessment of the health of the provision of legal services at each office, there was no standardized inspection process. To correct this deficiency, the current SJA to CMC developed uniform information requirements for use in these inspections that, in conjunction with CGIP inspections, give Commanders and their SJAs a more accurate assessment of legal readiness.⁴³⁷

e) Case Tracking

Since 2006, the Navy JAG Corps has used the Court-Martial Tracking and Information System (CMTIS) to track individual U.S. Navy cases from preferral of charges to receipt by Navy-Marine Corps Appellate Review Activity (NAMARA). In February 2010, the Marine Corps implemented and made mandatory a single web-based, Corps-wide Case Management

⁴³³ U.S. Marine Corps Order 5040.6H, *Marine Corps Readiness Inspections and Assessments* (Mar. 18, 2007) [hereinafter MCO 5040.6H]. In accordance with MCO 5040.6H, Commanders, Marine Forces; Commanding Generals, Marine Expeditionary Forces; Commanding Generals, Major Subordinate Commands; Commanding Generals, Marine Corps Installations; and Commanding Officers of the Marine Corps shall design and implement a Commanding General's Inspection Program (CGIP) as outlined in NAVMC Directive 5040.6H. MCO 5040.6H, *supra*, ¶ 5.c., at 4; U.S. Dep't of Navy, Navy-Marine Corps Dir. 5040.6H, *Marine Corps Readiness Inspections and Assessments*, enclosure (1) (Mar. 18, 2007) [hereinafter NAVMC Dir. 5040.6H].

⁴³⁴ Command Inspectors General use Automated Inspection Reporting System (AIRS) inspection checklists when conducting CGIP inspections. NAVMC Dir. 5040.6H, *supra* note 433, ¶ 1.b. of enclosure (1), at 3-1.

⁴³⁵ Message 142126Z MAY 10, MARADMIN 276/10, *Subj: Implementation of Command Inspections of SJA Offices, Law Centers and Legal Service Support Section* (stating that SJA offices, Law Centers, and LSSSs had not previously been subject to inspection within the CGIP).

⁴³⁶ SECNAVINST 5430.27C, *supra* note 15, ¶ 8.f., at 6.

⁴³⁷ USMC SAP, *supra* note 42, at 26.

System (CMS).⁴³⁸ CMS tracks court-martial cases in a single database from receipt of the Request for Legal Services (RLS) through trial and until the case is received at NAMARA. NAMARA uses CMTIS to track cases from receipt to NMCCA, then to archive; NMCCA uses CMTIS to track cases from receipt of the case until it is closed by the court's action.

The *DoD IG Report* spends a considerable amount of time evaluating both CMTIS and CMS, ultimately concluding that “Although [CMTIS and CMS] represent progress in recent years, Navy and Marine Corps managers and supervisors still do not have the visibility they need from automated systems to monitor case progress and timeliness across the post-trial process.”⁴³⁹

Additionally, the *DoD IG Report* noted that:

The recently-fielded Marine Corps CMS appears to have substantially greater potential than the Navy CMTIS. Specifically, CMS appears to offer better and more complete capability for management to maintain visibility over individual case processing and status in the field, including post-trial processing in the field. However, CMS is still new, relatively untested and has yet to develop all the needed capabilities.⁴⁴⁰

Until recently, the DON was working on a unified Navy and Marine Corps criminal justice case processing and tracking system – the DON Criminal Justice Information System (DONCJIS). In September 2010, DONCJIS was cancelled due to failure in performance tests and funding shortfalls. Witness testimony to the Panel supported the employment of a single system to track all the DON cases from cradle to grave.⁴⁴¹

The Panel agrees with the goal of a single DON courts-martial case tracking system that accurately tracks all phases of a court-martial through the military justice process. In March 2010, the JAG initiated a Center for Naval Analyses (CNA) study to examine the current Navy and Marine Corps case tracking systems and to benchmark those systems against case tracking systems used by the federal court, the Air Force, and the Army. The CNA study, which is due in

⁴³⁸ Message 012130Z FEB 10, MARADMIN 062/10, *Subj: Implementation of Case Management System for Courts-Martial* (mandating use of the Case Management System (CMS) by February 17, 2010 by all Marine legal offices to track military justice cases).

⁴³⁹ DoD IG Report, *supra* note 377, at 2-3.

⁴⁴⁰ *Id.* at 16-17.

⁴⁴¹ VADM Houck Testimony, *supra* note 107, at 75; CAPT Daniel E. O'Toole, JAGC, USN, Chief Judge, Department of the Navy, Transcript of October 6, 2010 Hearing, at 114.

February 2011, may assist in identifying possible options for a unified DON case tracking system.

f) Electronic Records of Trial

A related initiative that may provide substantial improvements to the post-trial mission is the use of electronic Records of Trial (e-ROT).⁴⁴² A substantial amount of time is required to mail or hand-deliver records of trial from office to office during the post-trial phase for purposes of review, authentication, clemency, Convening Authority's Action (CAA), and, if necessary, appellate review. The Marine Corps has implemented the use of e-ROTs at the Legal Services Support Section at Camp Pendleton. Additionally, the NMCCA has approved a pilot program using these e-ROTs for their review of Camp Pendleton cases.

g) The Results

The DON's post-trial processing has steadily improved since 2006. The statistics below indicate that the leadership and specific corrective actions of the JAG and SJA to CMC have progressively reduced the time needed to process appeals.

- **Timelines**

- Of the 3,920 cases docketed on appeal after (and thus controlled by) *U.S. v. Moreno* (June 10, 2006), only 10 exceeded the 18 month docketing-to-decision guideline:
 - 2006: 0
 - 2007: 1
 - 2008: 7
 - 2009: 2
 - 2010: 0

⁴⁴² The President amended R.C.M. 1104(a)(1) to allow electronic signature of "an electronic record of trial" and service of an authenticated electronic record of trial with a means to view it as satisfying the service requirements upon the accused and defense. See Exec. Order No. 13468, 73 Fed. Reg. 43827 (Jul. 28, 2008).

- **Due Process**

- With the exception of *U.S. v. Foster* in 2009, no case docketed on appeal after *Moreno* was granted appellate court relief for a due process violation resulting from post-trial delay.⁴⁴³

The Panel was directed to determine the number of judge advocates required to fulfill the legal mission of the DON. In carrying out the study, the Panel was further directed to review the judge advocate requirements of the DON for the military justice mission. Having conducted this review, the Panel concludes that, with regard to the military justice mission, the judge advocate requirement is not necessarily just about numbers of judge advocates; more accurately, engaged leadership and effective oversight are the keys to ensure continued accomplishment of the DON's military justice mission.⁴⁴⁴

The Panel strongly supports the myriad of initiatives aimed at improving military justice processes that have been undertaken at both the Departmental and Service levels. The Panel believes, however, that three in particular are most responsive to a call for engaged leadership and effective oversight: a case tracking system, the Annual Report on the State of Military Justice, and the Military Justice Oversight Council (MJOC).

As the statistics above demonstrated, the DON has made significant improvements in post-trial processing of courts-martial over the past five years. In order to continue this positive trend, it is critical that the DON employ a single court-martial case tracking system. The system needs to be able to track cases from the preferral of charges or imposition of pretrial restraint at the Service level through appellate review at the Department level. Significant, dedicated

⁴⁴³ Letter from CAPT Daniel E. O'Toole, JAGC, USN, Chief Judge, Department of the Navy, to Mr. Daniel J. Dell'Orto, Chairman, Independent Review Panel to Study the Judge Advocate Requirements of the Department of the Navy (Ser 05/0024) (Nov. 3, 2010). This statistic does not include cases where appellate court relief was granted under the broad mandate of Article 66(c), UCMJ for post-trial delay that did not amount to a due process violation. *See, e.g., United States v. Bartolo*, 2011 WL 150190 (N-M.C.C.A. Jan. 18, 2011). In *Bartolo*, one of the cases noted in the DoD IG Report, the NMCCA found that while the post-trial delay was facially unreasonable, there was no prejudice to the appellant and no due process violation. The Court did, however, grant the appellant sentence relief after considering whether the delay affected the findings and sentence that should be approved under Article 66(c), UCMJ.

⁴⁴⁴ Similarly, the DoD IG, in summarizing its findings, noted "consistent failures in leadership, supervision and oversight at all organizational levels, impacting military justice in both the Navy and Marine Corps." DoD IG Report, *supra* note 377, at 2.

funding will be necessary to develop and implement the courts-martial case tracking system the DON needs to ensure effective oversight capability.

While it is evident that the current leadership in the Navy and Marine judge advocate communities are focused on military justice, institutionalizing both the Annual Report on Military Justice and the MJOC will ensure continued focus.⁴⁴⁵ The Panel therefore recommends inclusion of those requirements in the revision of SECNAVINST 5430.27C. As the AJAG (Military Justice), Col Peter B. Collins, USMC, stated during his testimony,

[O]ne thing I don't have a checklist on is engaged leadership. 15 years from now, [if] leadership is not engaged, not taking this military justice stuff seriously, we will have [another case like] *Foster*. So we need engaged leaders, we need to set the standard, we need to train to those standards, [inspect to] those standards. That's how we keep going.⁴⁴⁶

F. Review of Requirements for Community Health

The Panel was directed to “review, evaluate, and assess such other matters and materials as the Panel considers appropriate for the purpose of the study.”⁴⁴⁷ Based upon the testimony and evidence provided to the Panel, it became clear that maintaining the quality of judge advocates is inextricably linked to maintaining the right number of judge advocates. Testimony from the client community was, without exception, complimentary when describing the professionalism of judge advocates. We believe that the health of the communities in this regard rests on three pillars: recruiting, retention, and professional education and training. We address each pillar below separately for the Navy and Marine Corps.

⁴⁴⁵ As the DoD IG noted, as currently established, the Military Justice Oversight Council (MJOC) could be terminated at any time and successor Navy JAGs might choose not to continue the current commitment to military justice oversight. *Id.* at 53.

⁴⁴⁶ Col Peter B. Collins, USMC, Assistant Judge Advocate General of the Navy (Military Justice), Navy-Marine Corps Appellate Review Activity, Transcript of October 6, 2010 Hearing, at 122.

⁴⁴⁷ National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111-84, § 506(b)(2)(G), 123 Stat. 2190, (2009).

1. Community Health within the Navy Judge Advocate General's Corps

The Navy JAG Corps strives to recruit, retain, and develop the highest quality of judge advocates to serve the Department of the Navy and ensure the U.S. Navy's legal readiness across the range of military operations.

a) Recruiting

The Navy JAG Corps has taken an active role in, and has been successful at, recruiting talented applicants for the Navy JAG Corps. JAG Corps recruitment includes frequent interaction with law schools, affinity groups, and outreach programs such as the Navy JAG Corps' National Moot Court Competition,⁴⁴⁸ which is focused on the law school community.⁴⁴⁹ By agreement with the Navy Recruiting Command, the Navy JAG Corps screens applicants to ensure it is obtaining those best suited for service in the U.S. Navy. During the application process, candidates go through a structured interview that is based upon the "whole-person concept," and their records are reviewed by a selection board, which recommends the best-suited candidates for a commission in the U.S. Navy JAG Corps.⁴⁵⁰ While assuming a greater role in recruiting judge advocates requires expenditure of Navy JAG Corps resources, most notably attorney time,⁴⁵¹ Navy JAG Corps recruiting efforts have contributed to a large pool of qualified applicants and allowed the JAG Corps to be more selective.⁴⁵² Only four percent of qualified applicants are selected.⁴⁵³

Each year, the Navy gives approximately seven junior officers the opportunity to transfer laterally to the Navy JAG Corps through the Law Education Program (LEP).⁴⁵⁴ This is an

⁴⁴⁸ VADM Houck Testimony, *supra* note 107, at 166-67; *see also*

<http://www.jag.navy.mil/nationalmootcourtcompetition.htm>.

⁴⁴⁹ VADM Houck Presentation, *supra* note 4, at 60.

⁴⁵⁰ http://www.jag.navy.mil/careers_/careers/apply.html (noting that "All candidates are judged on the 'whole-person concept' and only the best-suited individuals are professionally recommended."); *see* VADM Houck Testimony, *supra* note 107, at 164 (explaining the structured interview process).

⁴⁵¹ VADM Houck Testimony, *supra* note 107, at 167 (explaining that Navy Recruiting Command works closely with the JAG Corps by processing for a commission those applicants that are professionally recommended by the Judge Advocate General, and by providing funding for JAG Corps presence at certain national recruiting events).

⁴⁵² *See* VADM Houck Testimony, *supra* note 107, at 167; *see*

http://www.jag.navy.mil/careers_/careers/opportunities_sp.html (follow "Application Process" hyperlink).

⁴⁵³ http://www.jag.navy.mil/careers_/careers/opportunities_sp.html (follow "Application Process" hyperlink).

⁴⁵⁴ http://www.jag.navy.mil/careers_/careers/opportunities_lep.html.

exceptionally competitive program,⁴⁵⁵ available to officers who have served on active duty for at least two years, but not more than six years.⁴⁵⁶ Officers are selected by a board and receive funded legal education at an American Bar Association (ABA)-accredited law school, and in addition, their full salary.⁴⁵⁷ Officers incur a six-year service commitment upon completing the program.⁴⁵⁸

b) Retention

The Navy JAG also views retention as a key to maintaining a JAG Corps that is strong enough to meet the legal requirements of the Navy. Within the Navy JAG Corps, retention efforts are focused on measures enhancing quality of life and monetary payments at strategic career milestones.

The Navy JAG Corps has taken some innovative steps in addressing quality of life issues through work-life initiatives that promote geographic stability and mitigate the loss of personnel who, without such programs, might leave active duty due to family conflicts. An example of such a program is the Virtual Command pilot program. The program allows judge advocates assigned to headquarters functions to telecommute by working out of a Navy office close to their home.⁴⁵⁹ The Career Intermission Program that authorizes a member's temporary release from

⁴⁵⁵ Telephone interview by Lieutenant Commander Raghav Kotval, JAGC, USN, Staff, Independent Review Panel to Study the Judge Advocate Requirements of the Department of the Navy, with Commander Justin Clancy, JAGC, USN, Judge Advocate General's Corps Lieutenant Commander and Individual Augmentee Detailer (Dec. 7, 2010) (Commander Clancy explained that the JAG Corps typically receives 40 applications for the Law Education Program each year).

⁴⁵⁶ U.S. Dep't of Navy, Sec'y of the Navy Instr. 1520.7F, *Law Education Program*, ¶ 5.c.(2), at 2 (6 Sep. 2002) [hereinafter SECNAVINST 1520.7F].

⁴⁵⁷ *Id.* ¶¶ 3.-5. of enclosure (1), at 2-5; see also Message 090041Z JUN 10, NAVADMIN 198/10, *Subj: FY11 Law Education Program Selection Board*.

⁴⁵⁸ See SECNAVINST 1520.7F, *supra* note 456, ¶ 6.c. of enclosure (1), at 5 (stating that "All program participants will serve on active duty following completion of the program for two years (24 months) for each year (12 months), or any part thereof, of legal training in the program."). ABA-approved law schools normally require three-years of attendance in order to earn a degree.

⁴⁵⁹ VADM Houck Testimony, *supra* note 107, at 168-69. The program is currently in use in Jacksonville, Florida for functions that would otherwise be performed at headquarters. *Id.*

active duty, contingent on a subsequent service commitment, is an innovative U.S. Navy-wide program used by the Navy JAG Corps to retain judge advocates.⁴⁶⁰

The average undergraduate and law school debt of a new accession in the Navy JAG Corps is \$108,000.⁴⁶¹ Educational debts are offset by all four Services through different programs in different amounts. Currently, aggregate compensation in the Army is the highest, at \$185,000, followed by the Air Force, at \$125,000, followed by the Navy at \$60,000, and the Marine Corps at \$45,000.⁴⁶² There are two general categories of incentives: continuation pay and Student Loan Repayment Programs (SLRP).⁴⁶³ SLRP is currently only offered by the Army and the Air Force.⁴⁶⁴

The Navy Judge Advocate Continuation Pay (JACP) program provides payments totaling \$60,000 to qualified judge advocates in approximately the fourth, eighth, and tenth years of their active-duty service. Navy JACP is not a bonus offered to every judge advocate, but a performance-based incentive offered only to officers who compete and are selected for career status. The JAG testified that JACP should be increased to \$90,000, and in no event should it be withdrawn, despite a challenging fiscal environment.⁴⁶⁵

c) Professional Education and Training

Within the Navy JAG Corps, professional education and training is accomplished primarily through post-graduate legal education and through focused training courses offered by the Naval Justice School, and other institutions. Post-graduate education, resulting in a Master of Law (LL.M.) degree, is accomplished through a civilian law school or through the U.S.

⁴⁶⁰ Chief of Naval Operations Instr. 1330.2A, *Navy Career Intermision Pilot Program Guidelines*, ¶ 1., at 1, ¶ 3. of enclosure (2) (30 Aug. 2010); see also VADM Houck Testimony, *supra* note 107, at 169; VADM Houck Presentation, *supra* note 4, at 61.

⁴⁶¹ VADM Houck Testimony, *supra* note 107, at 173-74.

⁴⁶² VADM Houck Presentation, *supra* note 4, at 64; see also Message 161726Z SEP 10, MARADMIN 515/10, *Subj: FY11 Law School Education Debt Subsidy (LSEDS) Program* [hereinafter MARADMIN 515/10] (stating that eligible judge advocates qualify for three payments of \$15,000, for a total of \$45,000).

⁴⁶³ 10 U.S.C. § 2171 (2010).

⁴⁶⁴ VADM Houck Presentation, *supra* note 4, at 64.

⁴⁶⁵ VADM Houck Testimony, *supra* note 107, at 174-75. The Navy JAG's concerns with the complete removal of the Judge Advocate Continuation Pay (JACP), as is periodically suggested in response to fiscal constraints, are that it factors into the lifetime financial plans of judge advocates and that its removal would negatively affect the quality of candidate recruited or retained in the JAG Corps. *Id.*

Army's Judge Advocate General's Legal Center and School (TJAGLCS).⁴⁶⁶ The Navy JAG Corps' goal is to send every judge advocate to post-graduate school.⁴⁶⁷ Authorized areas of study include international law, environmental law, trial advocacy, and military law.⁴⁶⁸ The Navy JAG has negotiated agreements with several law schools to obtain reductions in tuition, thereby leveraging training funds.⁴⁶⁹ The Navy JAG testified that post-graduate school education is imperative in developing subject matter experts who are able to support the DON in today's complex legal environment.⁴⁷⁰ The Navy JAG also testified about the significant retention value of post-graduate education, stating that it was the "single biggest retention tool" for the Navy JAG Corps.⁴⁷¹ One year of funded post-graduate school at a civilian institution requires a commitment of three years (two years for TJAGLCS) of obligated service, beginning after the completion of education, to run concurrently with any pre-existing service obligation.⁴⁷²

The JAG also testified about the importance of Joint Professional Military Education (JPME) in today's Joint environment.⁴⁷³ However, obtaining training for JPME has been challenging for the judge advocate community. As discussed in detail in Section III.B.5., *supra*, judge advocates are waived from the Joint Service Officer provisions of the *Goldwater-Nichols Defense Reorganization Act of 1986*.⁴⁷⁴ Accordingly, Navy programmers do not recognize JPME as a valid requirement for U.S. Navy judge advocates, making it difficult for the Navy JAG Corps to obtain funding for such training.

⁴⁶⁶ VADM Houck Presentation, *supra* note 4, at 63; *see also* VADM Houck Testimony, *supra* note 107, at 171-73. Civilian institutions attended by Navy JAGs include Harvard University, Columbia University, the University of Pennsylvania, the University of Virginia, Georgetown University, George Washington University, Lewis and Clark College, Vermont Law School, the University of San Diego, and Temple University. VADM Houck Testimony, *supra* note 107, at 171-73; VADM Houck Presentation, *supra* note 4, at 63.

⁴⁶⁷ VADM Houck Testimony, *supra* note 107, at 171 (recognizing that Navy-wide rules regarding funded education will make some officers ineligible).

⁴⁶⁸ VADM Houck Presentation, *supra* note 4, at 63.

⁴⁶⁹ VADM Houck Testimony, *supra* note 107, at 171-72 (testifying that, in the cases of Harvard, Columbia, the University of Pennsylvania, Georgetown, and George Washington, the combined scholarships total approximately the equivalent of tuition for five attorneys).

⁴⁷⁰ *See* VADM Houck Testimony, *supra* note 107, at 172-73; *see also* VADM Houck Presentation, *supra* note 4, at 63.

⁴⁷¹ VADM Houck Testimony, *supra* note 107, at 172.

⁴⁷² VADM Houck Presentation, *supra* note 4, at 63.

⁴⁷³ VADM Houck Testimony, *supra* note 107, at 159-60.

⁴⁷⁴ *Id.* at 158-60; *see also* Goldwater-Nichols Department of Defense Reorganization Act of 1986, Pub. L. No. 99-433, 100 Stat. 992 (1986).

2. Community Health Within the Marine Judge Advocate Community

The Marine Corps seeks to maintain balance between its requirement for all officers to be integrated Marine Air-Ground Task Force (MAGTF) officers, and its requirement to maintain a professional legal community. The Marine Corps believes that these requirements are not mutually exclusive – the more complete a Marine MAGTF officer, the more effective a Marine judge advocate.

a) Recruiting

Within the Marine Corps, judge advocates are recruited using the same system used to recruit all Marine officers; the system is directed, managed, and executed by Marine Corps Recruiting Command (MCRC). The Marine Corps recruits potential officers through the use of Officer Selection Officers (OSO) located in geographical regions throughout the country. OSOs use a mix of advertising and outreach programs to connect with potential officer candidates. There are no judge advocate-specific incentives for recruiting. Rather, they are offered the same incentive as any other potential officer candidate – the opportunity to earn a commission and serve as a regular unrestricted Marine line officer, with all the normal rights, privileges, honors, and responsibilities that such service entails.⁴⁷⁵ At a minimum, to be eligible to become a Marine judge advocate, candidates must have a score of at least 150 on the Law School Admission Test (LSAT) examination and meet all the same moral, mental, and physical requirements of all potential officer candidates.⁴⁷⁶

Nonetheless, in 2007 the Marine Corps created the position of Staff Judge Advocate within the MCRC staff, in part to provide the judge advocate community with a greater role in judge advocate accessions programs.⁴⁷⁷ Not long after, MCRC formally established a program of mentoring, internship, and clerkship for law students who have completed Officer Candidate

⁴⁷⁵ SJA to CMC *Submission*, *supra* note 38, at 20, 40 n.169, 42 n.173; SES Applegate Testimony, *supra* note 155, at 136-38, 146-47; *see also* MajGen Ary Testimony, *supra* note 242, at 304-06; Col Ewers Testimony, *supra* note 155, at 157-59.

⁴⁷⁶ U.S. Marine Corps Recruiting Command Order 1131.1, *Marine Corps Recruiting Command Law Programs*, 2, 4-5 (Jun. 15, 2009) [hereinafter MCRCO 1131.1]; *see* U.S. Marine Corps Order P1100.73B, *Military Personnel Procurement Manual, Volume 3, Officer Procurement (Short Title: MPPM OFFPROC)*, *passim* (29 Sep. 1989) [hereinafter MCO P1100.73B].

⁴⁷⁷ USMC *SAP*, *supra* note 42, annex F, at 10-11.

School (OCS), have received their commissions, and are participating in the Platoon Leaders Course (PLC).⁴⁷⁸ This program assists and encourages these accessions to complete law school, pass the bar exam, and ready themselves for The Basic School (TBS).⁴⁷⁹ In so doing, the Marine Corps believes it will acquire more qualified officers and judge advocates, increase the likelihood of successful accessions, and ultimately increase the stature and reputation of its judge advocate program.⁴⁸⁰

Annually, the Marine Corps also accesses an average of eight judge advocates through lateral moves.⁴⁸¹ Lateral moves are accomplished through the Funded Law Education Program (FLEP) and the Excess Leave Program (ELP).⁴⁸² The programs offer active-duty Marine officers from other Military Occupational Specialties (MOS) an opportunity to attend an ABA-accredited

⁴⁷⁸ *Id.* annex F, at 11; *see also* MCRCO 1131.1, *supra* note 476, at 2. Platoon Leader's Course-Law is one of two general commissioning sources for judge advocates; the other is Officer Candidates Course (OCC) (Law). MCO P1100.73B, *supra* note 476, ¶ 2101.1., at 2-9; MCRCO 1131.1, *supra* note 476, at 2. The Platoon Leaders Course (PLC) (Law) is a program similar to the undergraduate PLC course for non-lawyers, through which the majority of Marine officer candidates are accessed. MCO P1100.73B, *supra* note 476, ¶ 2100., at 2-5 to -9. The PLC (Law) option is for those who are in their last year of undergraduate studies, or in their first or second year of law school. *Id.* ¶ 2100.1.b., at 2-5. Officer candidates in PLC (Law) earn their undergraduate degree, attend Officer Candidate School during the summer, earn their commission, receive a Military Occupational Specialty of 4401 (student judge advocate), then enter into an Inactive Ready Reserve (IRR) status while attending law school. MCRCO 1131.1, *supra* note 476, at 5-7; *see* MCO P1100.73B, *supra* note 476, ¶ 4.c., at 2-7. During the summer in between the first and second, and second and third year of law studies, they return to an active status and complete an internship with an active component Legal Service Support Section (LSSS), Law Center or Staff Judge Advocate (SJA) Office. *See* MCRCO 1131.1, *supra* note 476, at 9. After completion of law school, they must take, and pass, a state bar exam, at which point they return to active duty and attend The Basic School (TBS). MCO P1100.73B, *supra* note 476, ¶ 2100.4.c., at 2-7.

⁴⁷⁹ *See* USMC SAP, *supra* note 42, annex F, at 11; MCRCO 1131.1, *supra* note 476, at 2.

⁴⁸⁰ MCRCO 1131.1, *supra* note 476, at 2.

⁴⁸¹ USMC SAP, *supra* note 42, annex F, at 5, 11; Message 261031Z DEC 10, MARADMIN 694/10, *Subj: FY11 Report of the Funded Law Education Program (FLEP), Excess Leave Program (ELP), Special Education Program-Law (SEP LAW), Advance Degree Program-Law (ADP LAW), The Judge Advocate General's Legal Center and School (TJAGLCS) and College Degree Program (CDP) Selection Board Results* [hereinafter MARADMIN 694/10]; Message 250929Z SEP 09, MARADMIN 0579/09, *Subj: FY10 College Degree Program (CDP) and Law Education Programs (LEP) Selection Board Results*; Message 200929Z APR 09, MARADMIN 262/09, *Subj: FY09 College Degree Program (CDP) and Law Education Programs (LEP) Selection Board Results*; Message 140829Z APR 08, MARADMIN 241/08, *Subj: FY08 College Degree Program (CDP) and Law Education Programs (LEP) Selection Board Results*; Message 090729Z APR 07, MARADMIN 247/07, *Subj: FY07 Advance Degree Program (ADP), College Degree Program (CDP), and Law Education Programs (LEP) Selection Board Results*; Message 121330Z APR 06, MARADMIN 167/06, *Subj: FY06 Advance Degree Program (ADP), College Degree Program (CDP), and Law Education Programs (LEP) Selection Board Results*. The specific number of Funded Law Education Program (FLEP)/Excess Leave Program (ELP) participants is determined each year by Manpower and Reserve Affairs, Manpower Plans based on forecasted judge advocate inventory requirements and fiscal constraints.

⁴⁸² *See* LEGADMINMAN, *supra* note 46, Ch. 19, at 19-3 to -15 (further explaining FLEP and ELP Law (L)).

law school to obtain a degree of Juris Doctor, take and pass a bar examination, attend NJS, and be certified as a judge advocate.

Historically, new officer accessions and lateral moves provide a sufficient number of judge advocates to meet forecasted annual requirements. However, several factors have driven up forecasted requirements significantly, particularly within the field grade rank of major, which in turn has required the Marines to grow the number of judge advocates in the rank of major.⁴⁸³ Recognizing that increasing accessions through FLEP and ELP would not generate results for well over four years, the Marines conducted two Return to Active Duty boards, specifically targeting reserve and separated experienced judge advocates, and officers who had obtained a law degree and were admitted to a State bar, in the grade of captain or major.⁴⁸⁴ These boards recently concluded, selecting 12 judge advocates for return to active duty in FY 10 and FY 11.⁴⁸⁵

b) Retention

Historically, because the structure and forecasted inventories for judge advocates remained relatively steady from year to year in the Marine Corps, the Marine Corps has not had any significant retention problems within the judge advocate community. Nevertheless, the increase in forecasted judge advocate requirements, along with an anomaly in attrition amongst company grade judge advocates in 2008, led the Marine Corps to take initiatives to ensure that sufficient rates of retention continue among company grade officers.⁴⁸⁶ The retention initiatives include continuing 100% career designation opportunity and increasing Law School Education

⁴⁸³ MajGen Ary Testimony, *supra* note 242, at 335-37. Incremental growth in force structure over the past 5 years, approved increase of 32 structured billets in FY 15, and an anomaly in the rate of attrition for company grade judge advocates in 2008, have combined to drive up forecasted future inventory requirements. *See id.*

⁴⁸⁴ USMC SAP, *supra* note 42, annex F, at 5, 11; Message 241031Z MAY 10, MARADMIN 296/10, *Subj: Convening of the FY10 Return to Active Duty (RAD) Board Number 2 Officer Retention Board (ORB) Announcement* Message 051750Z JAN 10, MARADMIN 005/10, *Subj: Change 1 to the Convening Order for the Return to Active Duty (RAD), Interservice Transfer (IST), Officer Retention Board (ORB) Announcement.*

⁴⁸⁵ MajGen Ary Testimony, *supra* note 242, at 336; SES Applegate Testimony, *supra* note 155, at 143-44; SES Michael F. Applegate, Director, Manpower Plans and Policies Division, Manpower and Reserve Affairs, Headquarters, Marine Corps, *Actions Taken to Resolve SJA Shortfalls*, 1 (Oct. 13, 2010) [hereinafter SES Applegate Presentation]. In addition, 34 judge advocate billets have been added to the inventory. SES Applegate Testimony, *supra* note 155, at 134-35. The Panel notes that two of the 34 billets are actually 4430 legal administration officer billets.

⁴⁸⁶ *See* MajGen Ary Testimony, *supra* note 242, at 335-37. This includes incremental growth in force structure over the past 5 years, approved increase of 32 structured billets in FY 15, and an anomaly in the rate of attrition for company grade judge advocates in 2008, have combined to drive up forecasted future inventory requirements.

Debt Subsidy (LSEDS).⁴⁸⁷ The 100% career designation means that any qualified company grade judge advocate applying, and competing, for career designation on an annual board is virtually guaranteed to be selected, whereas all other occupational specialties have recently been limited to an average of 85% career designation.⁴⁸⁸ LSEDS is not designed to serve as a recruiting tool. The Marine Corps believes that officer candidates seeking to become Marine judge advocates generally are not considering a career in any other Service JAG Corps. Instead, the LSEDS program is designed to provide financial relief for career judge advocates burdened by law school debt. The program recognizes that judge advocates accessed through PLC and OCC have literally funded their own MOS training in contrast to other communities. LSEDS is being increased from \$30,000 to \$45,000 beginning in FY 11, which is significant in light of the fact that other popular financial incentives and bonuses for enlisted Marines and pilots are being simultaneously reduced.⁴⁸⁹ In his testimony before the Panel, the Staff Judge Advocate to the Commandant of the Marine Corps (SJA to CMC) supported raising LSEDS above \$30,000 to help off-set rising law school debt, but cautioned against any excessive increase, explaining that “We want to make sure that we're still part of this organization and not viewed as a special corps within the Corps, and that allows us to be an effective voice in the Marine Corps.”⁴⁹⁰

c) Professional Education and Training

As discussed in Section I.C., *supra*, the Marine Corps does not have a separate staff corps. Accordingly, Marine judge advocates complete the same initial ten weeks of OCS and six months of leadership education at TBS as all unrestricted line officers in the Marine Corps. After this initial common training, Marine judge advocates attend NJS alongside their sister sea Service peers.

⁴⁸⁷ *Id.* at 335, 337.

⁴⁸⁸ See SES Applegate Testimony, *supra* note 155, at 132, 153; see SES Applegate Presentation, *supra* note 485, at 1.

⁴⁸⁹ MajGen Ary Testimony, *supra* note 242, at 337 (advocating for an increase of the then-existing \$30,000 Law School Education Debt Subsidy (LSEDS), without specifying the amount of the proposed increase); SES Applegate Testimony, *supra* note 155, at 141-42; SES Applegate Presentation, *supra* note 485, at 1; see also MajGen Ary Presentation, *supra* note 380, at 15-16. At the time of the Panel’s public hearing on September 1, 2010, the Marine Corps was in the process of raising the LSEDS to \$45,000.00, and accordingly released a message announcing the raise on September 16, 2010. MARADMIN 515/10, *supra* note 462.

⁴⁹⁰ MajGen Ary Testimony, *supra* note 242, at 337-38.

Marine judge advocates receive further in-Service education and training, including the general Professional Military Education (PME) that is required for all Marine officers to become competent MAGTF officers, and specialized legal training. PME requirements include completion of a resident or non-resident Career Level School (CLS) for captains, Intermediate Level School (ILS) for majors, and Top Level School (TLS) for lieutenant colonels.⁴⁹¹ Generally, completion of ILS meets the requirement for Joint Professional Military Education (JPME) I, and completion of TLS meets the requirement of JPME II.⁴⁹² Consequently, Marine judge advocates complete JPME I and II as a matter of course, contrary to their Navy counterparts.

The Marine Corps supports specialized legal training in the form of post-graduate education. Specifically, active-duty Marine judge advocates may attend an ABA-accredited civilian law school full-time to obtain a Masters of Law (LL.M.) degree in a practice area for which the Marine Corps has identified a requirement for specialized knowledge, education, and training. Although they vary from year to year, the authorized LL.M. practice areas generally include international law, criminal law, environmental law, and labor law. This year, for the first time, judge advocates may also earn an LL.M. in cyber law.⁴⁹³ The Marine Corps also allows active-duty judge advocates to attend the graduate course at The Judge Advocate General's Legal Center and School (TJAGLCS) full-time to obtain an LL.M. As discussed in Section III.G.5., *infra*, by identifying structured billets requiring judge advocates with specialized legal education, the Marine Corps is institutionalizing an increased demand signal for post-graduate education. By way of illustration, the annual quota for TJAGLCS had historically been 10 Marine judge advocates; however, the Marine Corps is negotiating with the Army to increase the

⁴⁹¹ See U.S. Marine Corps Order 1553.4B, *Professional Military Education (PME)*, enclosure (1), at 1-1 to -4, 1-8, 1-11 (25 Jan. 2008) [hereinafter MCO 1553.4B]. CLS is typically completed through residence at Expeditionary Warfare School in Quantico, Virginia, or by correspondence; ILS is typically completed through residence at USMC Command & Staff College in Quantico, Virginia or other equivalent service schools (e.g., Army CSC), or by correspondence; and TLS is typically completed through residence at Marine War College or other equivalent Service schools (e.g., Naval War College), or through correspondence. See *id.*

⁴⁹² *Id.* at 1-1.

⁴⁹³ Message 291029Z JUL 10, MARADMIN 423/10, *Subj: FY11 Funded Law Education Program (FLEP), Excess Leave Program (ELP), Special Education Program-Law (SEP LAW), Advance Degree Program-Law (ADP LAW), The Judge Advocate General's Legal Center and School (TJAGLCS) and College Degree Program (CDP) Selection Board* [hereinafter MARADMIN 423/10].

quota to 15 for FY 11 and beyond.⁴⁹⁴ A sufficient number of alternates were selected on the last board should the quota increase be approved.⁴⁹⁵ Similarly, the number of Marine judge advocates allowed to attend a civilian law school has increased from a historic range of two to five per year to seven in FY 11.⁴⁹⁶ The Panel notes that even before these recent efforts, the Marine Corps had made significant progress in providing their judge advocates an opportunity to obtain an advanced degree. Currently, out of the active-duty population, 76% of colonels, 70% of lieutenant colonels, and 38% of majors have either attended the TJAGLCS career course or obtained an LL.M. from a civilian institution.⁴⁹⁷

3. Maintaining Community Health

The Panel concurs with the Navy JAG and the SJA to CMC's testimony about the importance of Judge Advocate Continuation Pay (JACP) and the Law School Education Debt Subsidy (LSEDS), and notes that judge advocates in the Navy and Marine Corps receive significantly lower amounts than their counterparts in the Army and the Air Force. While financial considerations may not be the impetus to join the Navy or Marine Corps, a later decision to remain on active duty may well include a financial analysis. Some judge advocates may desire to continue to serve, but may simply be unable to do so financially as a combination of law school debt and other financial commitments often incurred subsequent to joining the military, such as a mortgage and family expenses, become a reality. The Panel further recognizes that there exists an imbalance between officer communities in which initial education is provided at the expense of the government, for example aviation, and the judge advocate community, in which law school is usually paid for as a personal expense. The Panel believes that maintaining, and potentially increasing, JACP and LSEDS is directly related to maintaining the quality of judge advocates in the Department of the Navy.

The Panel applauds the Navy's commitment to recruiting, and concurs with the importance of the investment, even given the cost of valuable attorney time. The Panel likewise applauds the Marine Corps' recruiting and retention efforts, and recognizes the balance that must

⁴⁹⁴ *See id.*

⁴⁹⁵ MARADMIN 694/10, *supra* note 481.

⁴⁹⁶ MARADMIN 423/10, *supra* note 493.

⁴⁹⁷ Col John R. Ewers, USMC, Deputy Staff Judge Advocate to the Commandant of the Marine Corps, *Marine Judge Advocate Career Progression*, 7 (13 Oct. 2010) [hereinafter Col Ewers Presentation].

be maintained between their cultural and operational requirement for well-rounded MAGTF officers on the one hand, and their commitment to accessing, retaining, and developing quality legal professionals on the other.

The Panel underscores the importance of post-graduate education for judge advocates in both the Navy and the Marine Corps. In a world where the ability to train and conduct military operations is increasingly subject to nuanced policy and legal issues, judge advocates with focused subject matter expertise increasingly contribute to mission capability. Finally, the Panel again expresses concern over the issue of JPME for U.S. Navy judge advocates. The Panel concurs with the JAG's testimony regarding the importance of JPME. In the view of the Panel, the Navy needs to develop and fund a requirement for its judge advocates to receive JPME.

G. Review of Other Manpower Studies

In its direction to the Panel, Congress invited the Panel to review, and incorporate as appropriate, the findings of applicable ongoing and completed studies in future manpower requirements, including the two-part study by Center for Naval Analyses (CNA) titled *An Analysis of Navy JAG Corps Future Manpower Requirements (CNA Study)*.⁴⁹⁸ The Panel found it appropriate to consider the *CNA Study*, and a series of additional studies conducted, or initiated by the Marine Corps.

1. CNA: An Analysis of Navy JAG Corps Future Manpower Requirements

The Panel considered the *CNA Study* analysis, and heard the testimony of the JAG, Dr. Donald A. Birchler, the research leader for the analysis, and Dr. Neil B. Carey, the project manager for all phases of the analysis.

A determination by Navy JAG Corps leadership that it was important to obtain an independent assessment of the Navy's current and future legal requirements and their impact on

⁴⁹⁸ National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111-84, § 506(b)(3), 123 Stat. 2190 (2009); see also CNA Manpower Study, Part 1, *supra* note 334; CNA Manpower Study, Part 2, *supra* note 164.

manpower led to the request for the *CNA Study*.⁴⁹⁹ The *CNA Study* was designed to be a comprehensive assessment of the Navy JAG Corps community across all budget submitting offices (BSOs).⁵⁰⁰ Incorporating the officer, enlisted, and civilian populations, the *CNA Study* assessed the JAG Corps community as a whole, across all commands and functional areas. The expectation from the then-JAG was that the *CNA Study* would produce an algorithm that could be used in the manning process.⁵⁰¹ The study commenced in September 2006,⁵⁰² and work was completed in the fall of 2007.⁵⁰³ The majority of the data relied upon by CNA was collected between May and June of 2007.⁵⁰⁴ The first and second parts of the report were published in February and April of 2008, respectively.⁵⁰⁵ The study was for the purposes of, and limited to, the U.S. Navy JAG Corps.⁵⁰⁶

a) Description and Methodology of the Study

CNA sought to accomplish three tasks through the study: first, to identify the priorities in, and current levels of, legal service provided by the JAG Corps; second, to facilitate the appropriate force structure; and third, to develop a range of options for the JAG Corps in its provision of legal services.⁵⁰⁷

There are significant similarities between the process prescribed by the Navy at large in manpower calculations, and the methods used by CNA for the Navy JAG Corps study. The Navy's Total Force Manpower Process was described in detail in Section II, *supra*. In summary,

⁴⁹⁹ Letter from VADM James W. Houck, JAGC, USN, Judge Advocate General of the Navy, to Mr. Daniel J. Dell'Orto, Chairman, Independent Review Panel (Ser 00/0105) (Sep. 29, 2010) [hereinafter VADM Houck Letter (Ser 00/0105)].

⁵⁰⁰ See VADM Houck Testimony, *supra* note 107, at 196.

⁵⁰¹ *Id.* at 201.

⁵⁰² Dr. Neil B. Carey, Research Analyst, Center for Naval Analyses, Transcript of October 6, 2010 Hearing, at 39 [hereinafter Dr. Carey Testimony]; Neil Carey and Don Birchler, Center for Naval Analyses, *U.S. Navy JAG Corps Assessment*, 3 (6 Oct. 2010) [hereinafter CNA Presentation]; see also VADM Houck Testimony, *supra* note 107, at 195.

⁵⁰³ Dr. Donald A. Birchler, Research Analyst, Center for Naval Analyses, Transcript of October 6, 2010 Hearing, at 70 [hereinafter Dr. Birchler Testimony].

⁵⁰⁴ Dr. Carey Testimony, *supra* note 502, at 39 (also testifying that CNA collected the online work diary data in May and June 2007). The online work diary is discussed further in notes 508, 514, 515, and 537 *infra*.

⁵⁰⁵ Dr. Carey Testimony, *supra* note 502, at 39-40; CNA Presentation, *supra* note 502, at 3. In addition, in May 2008, CNA published a separate, but related, report discussing three levels of service options which are discussed *infra* in Section III.G.1.(b). Dr. Carey Testimony, *supra* note 502, at 40; CNA Presentation, *supra* note 502, at 3.

⁵⁰⁶ See VADM Houck Testimony, *supra* note 107, at 413.

⁵⁰⁷ CNA Presentation, *supra* note 502, at 2.

the process within the Navy for calculating manpower begins with a Budget Submitting Office (BSO) identifying the Missions, Tasks, and Functions (MTFs) required to be performed, and then measuring the workload required⁵⁰⁸ to meet the tasks at an acceptable level.⁵⁰⁹ Using the applicable Navy standard workweek,⁵¹⁰ the BSO then determines the minimum quantity of active-duty personnel required.

The *CNA Study* used substantially similar methodology, but particularized the process to the JAG Corps. In the Navy BSO-driven system, a community such as the JAG Corps, that is not a BSO, is not holistically analyzed.⁵¹¹ Using a list of practice areas developed with the assistance of the JAG,⁵¹² CNA was able to develop a rough equivalent to MTFs – in this case a detailed list of practice areas, and for each practice area, a series of task functions.⁵¹³ Workload was measured through online work diaries.⁵¹⁴ In order to enhance the quality of the work diary methodology, CNA pretested the work diary with a working group, trained JAGs and other personnel on how to input the data, reported back to respondents to enable them to correct responses that were unclear, and ensured that the internet connectivity on aircraft carriers was

⁵⁰⁸ OPNAVINST 1000.16K gives Billet Submitting Offices (BSOs) considerable flexibility in measuring workload. See OPNAVINST 1000.16K, *supra* note 47, appendix C to enclosure (1). The work diary method used by the Center for Naval Analyses (CNA) study had already been used by other Navy commands such as U.S. Fleet Forces Command and the Navy Manpower and Analysis Center. Dr. Carey Testimony, *supra* note 502, at 41-42.

⁵⁰⁹ See *supra* Section II.B.

⁵¹⁰ Workweeks vary depending on whether it is for purposes of shipboard manning during war (81 hours); ashore and shipboard manning where dependents are authorized (40 hours), or dependents are not authorized (57 hours); or ashore manning during mobilization (60 hours). See *supra* Section II.B., and discussion in note 79.

⁵¹¹ See *supra* Section II.B., and discussion in notes 87 and 88, discussing the 11 Navy BSOs that fund judge advocate billets.

⁵¹² CNA Manpower Study, Part 1, *supra* note 334, at 3; Dr. Carey Testimony, *supra* note 502, at 38.

⁵¹³ CNA Manpower Study, Part 1, *supra* note 334, at 34-35. Developing a list of practice areas and task functions was critical to establishing a framework for the study. Based on that framework, workload could be categorized, and categories compared to each other to determine where there should be increases or decreases in personnel. *Id.* at 40, 41 tbl.3-2.

⁵¹⁴ The Center for Naval Analyses (CNA) determined the work diary method was best suited to the JAG Corps. CNA Presentation, *supra* note 502, at 4. It consisted of judge advocates self reporting their work hours in 30 minute blocks in an online diary. CNA Manpower Study, Part 1, *supra* note 334, at 31-32; CNA Presentation, *supra* note 502, at 4. In addition to the work diary, CNA used a workforce assessment survey, which was embedded within the work diary, and through a separate survey attempted to include the contributions of personnel on limited duty. CNA Manpower Study, Part 1, *supra* note 334, at 36. We have not considered the contributions of those on limited duty (who are enlisted personnel temporarily assigned to commands within Naval Legal Service Command (NLSC)) as they do not relate directly to the judge advocate community. As the workforce assessment is embedded in the work diary, we discuss only the work diary. As discussed, the work diary has been considered an acceptable method of data collection for Budget Submitting Offices (BSOs). Dr. Carey Testimony, *supra* note 502, at 41-42.

sufficient to permit the participation of afloat personnel.⁵¹⁵ There was a high level of participation in the work diaries,⁵¹⁶ and a sensitivity analysis to adjust for assumptions made by CNA.⁵¹⁷ To obtain and cross reference additional sources of data to the work diaries, CNA interviewed over 25 Navy flag officers on their level of satisfaction with the Navy JAG Corps, and visited offices within the JAG Corps to conduct interviews.⁵¹⁸ CNA itself had confidence in the results of the study.⁵¹⁹ CNA's premise was that work hours were an "accurate indirect measure of workload."⁵²⁰ CNA's findings were based on the number of hours worked each week from data obtained from work diaries. These hours established a weekly baseline for judge advocates in individual commands and for the community as a whole. CNA then compared this weekly baseline to one of three different options: a 40-hour workweek, a 45-hour workweek, and a 50-hour workweek. The comparison enabled CNA to determine how many hours over or under the target option judge advocates were working. This in turn allowed CNA to determine the number of judge advocates that would be needed to reach the targeted hours per workweek.⁵²¹

b) Results of the CNA Study

CNA's most striking conclusions, other than those related to military justice, discussed below, were in the practice areas categorized as environmental law, international law, joint matters, and the law of war. In each of these practice areas, CNA predicted a 5.9% annual

⁵¹⁵ Dr. Carey Testimony, *supra* note 502, at 44-45, 50-51 (also noting that when judge advocates were unable to receive links on the ship, CNA emailed them paper and pencil versions of the online work diary and accepted their responses via email in order to ensure data validity).

⁵¹⁶ In the CNA Manpower Study, participation rates were discussed separately for each command. *See generally* CNA Manpower Study, Part 1, *supra* note 334. In his testimony, a CNA analyst aggregated response rates for officers at RLSOs, NLSOs and OJAG at 87%. Dr. Carey Testimony, *supra* note 502, at 45.

⁵¹⁷ *See, e.g.*, CNA Manpower Study, Part 1, *supra* note 334, appendices A & B, at 417-32. Assumptions made included the number of hours that should be used each week, and the number of people who should have responded. *Id.* appendices A & B, at 417, 425. To control for the first assumption, CNA presented the findings with multiple options. *Id.* CNA devised a formula to account for the second assumption. *Id.* appendices A & B, at 420, 428. Using the responses of those who did complete the work diary, CNA was able to project the responses of those who should have completed the work diary. *Id.* appendices A & B, at 420-24, 428-32.

⁵¹⁸ CNA Manpower Study, Part 1, *supra* note 334, at 31 to 32. CNA believed the interviews of flag officers were important because they "illuminated what the future might be like for the JAG Corps" and provided insight into how senior officers perceived the community. *Id.* at 32. The interviews of judge advocates permitted CNA to resolve early design issues in the study and obtain the perspectives of judge advocates in the fleet. *Id.*

⁵¹⁹ Dr. Carey Testimony, *supra* note 502, at 64.

⁵²⁰ VADM Houck Letter (Ser 00/0105), *supra* note 499.

⁵²¹ Center for Naval Analyses, *CNA – JAG Corps Functional Assessment*, 15 (undated) [hereinafter CNA Report Presentation].

growth rate.⁵²² One of the CNA research analysts stated that this projection likely underestimated the real growth rate, but explained that it was based on the best-available data.⁵²³

CNA's most comprehensive data collection and analysis was in the practice area of military justice.⁵²⁴ CNA obtained data on courts-martial from 1990 to 2006, separated by general courts-martial (GCM) and special courts-martial (SPCM).⁵²⁵ Focusing on the data from GCMs, but not the SPCMs,⁵²⁶ CNA concluded that the number of courts-martial were mostly flat for the period between 2003 and 2006.⁵²⁷ This was based on data from a three-year trend constituting the best evidence available to CNA. When the CNA analysts wrote their report in the fall of 2007, they concluded that the number of courts-martial was likely to remain steady.⁵²⁸ CNA based its military justice recommendations on this conclusion; however, data now available shows that both GCMs and SPCMs declined significantly between the years 2006 and 2009.⁵²⁹

In arriving at its findings and recommendations regarding JAG Corps manning requirements, CNA relied on the number of judge advocates on active duty when it drafted its report in the latter part of 2007.⁵³⁰ CNA did not consider the possibility of additional practice

⁵²² Dr. Birchler Testimony, *supra* note 503, at 74; Dr. Carey Testimony, *supra* note 502, at 80; CNA Presentation, *supra* note 502, at 28-29.

⁵²³ Dr. Carey Testimony, *supra* note 502, at 87. In their report, the Center for Naval Analyses (CNA) research analysts based the 5.9% increase on the annual rise in joint billets, their assessments of flag interviews, and discussions with JAG personnel. CNA Manpower Study, Part 1, *supra* note 334, at 46-47. Accordingly, CNA assumed an "increase in the near future exponentially at 5.9 percent annually (this is equivalent to saying that the workload will double in 12 years)." *Id.* at 47. However, CNA viewed the assumption as an underestimate of true growth, and noted that it did not include new initiatives, such as AFRICOM. *Id.* CNA did not base its assessment of a 5.9% increase on the work diaries. Dr. Birchler Testimony, *supra* note 503, at 88.

⁵²⁴ Dr. Carey Testimony, *supra* note 502, at 71-72 (stating that military justice was the single largest workload area for Navy JAGs, and that it had the best available data).

⁵²⁵ CNA Manpower Study, Part 1, *supra* note 334, at 50-51; Dr. Carey Testimony, *supra* note 502, at 69; *see also* CNA Presentation, *supra* note 502, at 17.

⁵²⁶ Dr. Carey Testimony, *supra* note 502, at 69. At the time the CNA research analysts were writing their report, they had in their possession data showing that special courts-martial had been declining significantly prior to 2006. *See* VADM Houck Presentation, *supra* note 4, at 33.

⁵²⁷ Dr. Carey Testimony, *supra* note 502, at 62, 83; *see also* Dr. Birchler Testimony, *supra* note 503, at 70.

⁵²⁸ Dr. Birchler Testimony, *supra* note 503, at 70. One of the CNA research analysts testified that the reason for assuming the courts-martial level was going to remain steady was that they did not want to go beyond the realm of available data. Dr. Carey Testimony, *supra* note 502, at 69.

⁵²⁹ VADM Houck Presentation, *supra* note 4, at 33.

⁵³⁰ Neil Carey et al., Center for Naval Analyses, *Levels of Service Options for the JAG Corps: Personnel-Mission Tradeoffs*, 7 (May 2008) [hereinafter *CNA Levels of Service Options*] (citing the number of U.S. Navy judge advocates as 750 at the time the CNA report was drafted). The number of U.S. Navy judge advocates has increased to the current number of 811 judge advocates.

areas in its calculations.⁵³¹ CNA also provided two levels of calculations based on the military justice caseload observed between 2003 and 2006 (discussed by CNA as “pre-2003” and “post-2003”).⁵³² In one calculation, referred to as the “low scenario,” CNA assumed that the military justice caseload would remain at 2003 to 2006 levels.⁵³³ In the other calculation, referred to as the “high scenario,” CNA assumed that the post-2003 caseload level reflected a temporary reduction that would swing back upwards to its “pre-2003” level.⁵³⁴

When factoring in the “high” and “low” workload assumptions and the different workweek assumptions, CNA provided six different options which are graphically represented in Table 12, below.⁵³⁵

	Option 1	Option 2	Option 3	Option 4	Option 5	Option 6
Workweek assumption	40-hr.	45-hr.	50-hr.	40-hr.	45-hr.	50-hr.
Workload assumption	High (pre-2003)	High (pre-2003)	High (pre-2003)	Low (post-2003)	Low (post-2003)	Low (post-2003)
Officer increase	332	242	160	191	119	50

Table 12. CNA Options

CNA recommended that the Navy JAG Corps base its actions on the 40-hour workweek as it was consistent with Navy instructions, it gave the Navy some flexibility in the event of

⁵³¹ See CNA Manpower Study, Part 2, *supra* note 164, at 137; see CNA *Levels of Service Options*, *supra* note 530, at 10. At the time of the publication of the Center for Naval Analyses (CNA) report, two areas for which the Navy currently provides legal support, the Disability Evaluation System (DES) and the Office of Military Commissions (OMC), did not have defined legal requirements and thus did not have personnel assigned. See CNA Report Presentation, *supra* note 521, at 12. Including the personnel currently assigned would increase CNA’s projected number of required U.S. Navy judge advocates by ten reserve judge advocates and two active-duty judge advocates for DES, and by 28 judge advocates for the OMC mission. See discussion *supra* Sections III.C and III.D.

⁵³² See Dr. Carey Testimony, *supra* note 502, at 62, 69 (stating that, although special courts-martial (SPCMs) continued to decline between 2003 and 2006, CNA only considered general courts-martial (GCMs), which were considerably more stable during that period). Both GCMs and SPCMs declined after 2006. VADM Houck Presentation, *supra* note 4, at 33.

⁵³³ CNA Manpower Study, Part 1, *supra* note 334, at 77.

⁵³⁴ *Id.* CNA did not consider a third scenario in which courts-martial caseloads would continue to decline. Dr. Carey Testimony, *supra* note 502, at 69.

⁵³⁵ CNA Report Presentation, *supra* note 521, at 15.

unanticipated requirements, and it provided a work-life balance that makes service appealing for a group with more lucrative alternatives.⁵³⁶

Table 13, below,⁵³⁷ reflects CNA’s finding regarding U.S. Navy judge advocate manpower requirements by command type using the 50-hour workweek and the “low” scenario.⁵³⁸

Command	Weekly work hrs	Currently on board	Difference	% Change
NLSO	50.7	169	4	2.4%
RLSO	50.3	160	1	0.6%
OJAG	47.5	104	0	0
NJS	55.5	27	5	18.5%
SJA: Non-operational	47.1	94	16	17%
SJA: Joint command	49.9	18	6	33.3%
SJA: Operational	60.3	40	13	32.5%
SJA: Afloat command	53.1	34	9	26.5%

Table 13. U.S. Navy Judge Advocate Manpower Requirements by Command Type Based on 50-Hour Workweek and CNA’s “Low” Scenario

It is important to note that Tables 12 and 13, above, incorporate CNA’s analysis for *future* manpower requirements over three years, ending in Fiscal Year 2010,⁵³⁹ and not *current*

⁵³⁶ *Id.* at 16 (citing OPNAVINST 1000.16K, *supra* note 47).

⁵³⁷ See CNA Manpower Study, Part 1, *supra* note 334, at 4-5 tbls.1 & 2; see CNA Manpower Study, Part 2, *supra* note 164, at 3-4 tbls.E-1, E-2, & E-3. These tables reflect hours that were adjusted to account for personnel who were on leave, sick, or in some other situation that prevented them from doing work related to the command. CNA Manpower Study, Part 2, *supra* note 164, at 44. Thus, the averages were adjusted up. *Id.* This was done by examining the average days worked as measured by the number of days in which a respondent entered at least some time in the online work diary. *Id.* The raw average workweek was then adjusted to reflect a typical five-day workweek. *Id.*

⁵³⁸ CNA relied on the 50-hour workweek analysis for the most prominent calculations in the manpower study, and also computed manpower requirements for 40- and 45-hour workweeks. CNA Manpower Study, Part 1, *supra* note 334, at 56. The Panel, in creating this table, considered only the “low” options that were based on the “post-2003” caseload levels of military justice because, as discussed in Section III.E., *supra*, today’s caseload is even lower than the “low” scenario. Therefore, between the two alternatives in the original tables – the “high” scenario and the “low” scenario - the latter is closer to our situation today.

⁵³⁹ Dr. Birchler Testimony, *supra* note 503, at 73-74.

requirements.⁵⁴⁰ An example is the case of SJAs at Joint Commands in billets projected to increase at a rate of 5.9% annually. Even though these SJAs were working an average of 49.9 hours per week when the data was collected in 2007, when the projected annual increase is included, future requirements increase the total number of judge advocates in this category by six, or 33%.⁵⁴¹

c) Panel Assessment of the Center for Naval Analyses Study

The Panel notes that, using the Center for Naval Analyses' (CNA's) data on the "low" scenario, even at the most stressful workload level considered by CNA, the 50-hour workweek, there were no sub-communities that required a decrease in manning, and five that would require a significant increase in manning at the following percentages: NJS by 18.5%, SJAs for non-operational commands by 17%, SJAs for Joint commands by 33.3%, SJAs for operational commands by 32.5%, and SJAs for afloat commands by 26.5%.

The Panel believes that CNA's report accurately characterized the "status quo" at the time of its research as "barely able to deal with the current workload,"⁵⁴² as well as the risks of meeting only minimum requirements, which were described as the lack of a surge capacity and an inability to meet any new requirements.⁵⁴³

The Panel shares the JAG's assessment of the strengths and weaknesses of the *CNA Study*.⁵⁴⁴ It was a valuable and good faith effort at quantifying workload.⁵⁴⁵ Using self-reporting work diaries, in light of CNA's efforts to enhance reliability, was acceptable and in consonance with Navy manpower calculation methods. The recording of senior officers' views on legal support requirements was of particular interest and value. However, the data in the study is now over three years old, the prediction that the military justice caseload would stay constant or

⁵⁴⁰ See CNA Manpower Study, Part 2, *supra* note 164, 26-27 (table 2-2 provides a more complete description of what Center for Naval Analyses (CNA) refers to as "Product area, driver, and associated rule for future workload assumption.").

⁵⁴¹ See *id.* at 4 tbl.E-3.

⁵⁴² CNA Report Presentation, *supra* note 521, at 13. CNA found that legal services were stretched to the limit, with a compromised ability to thoroughly analyze complex legal issues. *Id.* CNA noted that workloads in the areas of operational and environmental law were increasing rapidly, and predicted that additional billets would be needed to support this increase. *Id.*

⁵⁴³ CNA *Levels of Service Options*, *supra* note 530, at 12.

⁵⁴⁴ See VADM Houck Testimony, *supra* note 107, at 208-09.

⁵⁴⁵ *Id.* at 210-11.

increase has not proven to be accurate, and CNA was not asked to consider more nuanced approaches such as using civilian attorneys vice U.S. Navy judge advocates to meet some increasing workloads.⁵⁴⁶ Consequently, while informed by the *CNA Study*, the Panel looks to the JAG's manpower estimate as more current and nuanced.⁵⁴⁷

2. Staff Judge Advocate to the Commandant of the Marine Corps, 2005 Strategic Planning Panel

In December 2005, the SJA to CMC convened a panel of senior officers from the Marine legal community, which included SJAs, Officers-in-Charge (OICs), military judges, and others with extensive experience across the spectrum of legal practice areas.⁵⁴⁸ Their charter was to make recommendations for changes to Marine legal services organization, training, and equipment in order to increase support to operational commanders and meet evolving, future legal requirements. In conducting its analysis, the *2005 Strategic Planning Panel (SPP)* observed that:

Demands on our community have risen, and there are increased numbers of [judge advocate] assignments to joint billets, command, schools, and as MEU SJAs. The number of COCOMs, components and JTFs requiring [judge advocates] has also risen. At the same time, however, the structure of the 4402 community has remained the same.⁵⁴⁹

The *SPP* made recommendations on a host of organizational and training issues, including updating legal doctrine, providing further expertise in particular practice areas for particular billets, creating a Trial Counsel Assistance Program, and continuing to re-organize the reserve legal community to seamlessly integrate with the active component. With respect to numerical requirements, the *SPP* reviewed the entire 44XX occupational field structure, studied historical organizational work-loads and the ratio of judge advocates to respective geographic active-duty populations, and considered future operational demands.⁵⁵⁰ The *SPP* found that the current 4402 structure was outdated, as it had judge advocates in supporting establishment billets which were no longer required to fulfill the legal mission, and it did not reflect the growing

⁵⁴⁶ *Id.* at 210.

⁵⁴⁷ See VADM Houck Letter (Ser 00/0105), *supra* note 499.

⁵⁴⁸ U.S. Marine Corps, *2005 Strategic Planning Panel*, 1 (13-15 Dec. 2005) [hereinafter *2005 SPP*]; SJA to CMC *Submission*, *supra* note 38, at 10.

⁵⁴⁹ *2005 SPP*, *supra* note 548, at 1.

⁵⁵⁰ *Id.* at 1, appendices A, C.

demand for judge advocate support in Marine Corps operating forces and on the staffs of component and combatant commands. Accordingly, the *SPP* recommended the re-alignment of 18 structured 4402 billets from the supporting establishment to the operating forces.

The *SPP* also recommended re-coding non-4402 billets to reflect actual legal requirements within Marine commands. Historically, within some commands, the Marine Corps has assigned judge advocates to fill billets listed on the Table of Organizations (T/O) that were coded for a PMOS other than 4402, and then detailed the assigned judge advocate to fill unstructured legal requirements within the command. A typical example involves the Marine Expeditionary Unit (MEU) SJA. For over two decades, the Marine Corps has been providing seven judge advocates to serve as command legal advisors to the commanders of the seven MEUs. However, there was no structured billet coded for a Primary MOS (PMOS) of 4402 on the MEU T/O. Therefore, these judge advocates are assigned to a billet coded for some other PMOS (e.g., 0530 “Civil Affairs Officer”). The result is an overall 4402 structure that reflects something less than what is actually required.

The Panel notes that the SJA to CMC convened the *SPP* proactively, and that it understandably focused on legacy defects in the Marine Corps’ 4402 structure, rather than the emerging requirement for judge advocates to augment Marine Air-Ground Task Forces in Iraq and Afghanistan, or the Corps’ decision 14 months later to grow to 202,000.⁵⁵¹

3. 2006 Center for Naval Analyses Marine Corps Officer Manpower System Study

In 2006, the Center for Naval Analyses (CNA) conducted a study on behalf of Manpower and Reserve Affairs (Manpower and Personnel), of the Marine Corps officer manpower system to determine the degree to which officer inventories matched requirements.⁵⁵² CNA studied both the extent to which inventories met the requirements established in the Grade Adjusted Recapitulation (GAR), as well as the extent to which inventory allowed for staffing all A-billets (structured billets funded on the Authorized Strength Report (ASR)) and proportionate share of

⁵⁵¹ See generally Message 062050Z FEB 07, ALMAR 008/07, *Subj: Marine Corps End Strength Increase* [hereinafter ALMAR 008/07] (announcing that the Marine Corps would grow from the then-current end-strength of 175,000 to 202,000 Marines, over the course of 5 years).

⁵⁵² Cathleen M. McHugh et al., Center for Naval Analyses, *Analyses of the Marine Corps Officer Manpower System: Final Report* (May 2006).

free B-Billets.⁵⁵³ The study included all 43 officer Military Occupational Specialties (MOSs), and covered 16 fiscal years, from 1992 through 2005.⁵⁵⁴ Although not limited specifically to the 4402 MOS, it did specifically examine and report on the 4402 MOS in every aspect of the study. CNA found that: (1) although the 4402 Primary MOS's (PMOS's) inventories were generally short of the GAR requirement, their relative average shortfall was not "critically short;" (2) the 4402 PMOS inventories, on average, staffed approximately 95% of the required A-Billets, which was above the relative average; and (3) conversely, the 4402 PMOS had a below-average proportion of officers assigned to B-Billets.⁵⁵⁵

4. Judge Advocate Division 2007 Structure Review

In early 2007, the SJA to CMC undertook another review of the 4402 judge advocate structure. This study focused on the current need for judge advocate support, and did not factor in the then-recently announced plan to grow the Marine Corps to 202,000 by 2011.⁵⁵⁶ This study considered the input of SJAs and OICs, vetted by their commanders, and conducted a line-by-line review and validation of every billet in the 4402 (judge advocate) structure. The study recommended 22 compensated (realigning 4402 structure), and 36 uncompensated (creating new 4402 structure) changes to the force structure.⁵⁵⁷ Although titled "uncompensated" changes, 10 of the 36 requested were actually requests to re-code existing non-4402 structure that was historically filled by 4402s (i.e., seven MEU SJAs and three Deputy Marine Expeditionary Force (MEF) SJAs). The remaining 26 were primarily to increase the number of judge advocates in the MEF command elements, the Legal Service Support Sections (LSSSs), larger Law Centers, and the staffs of the Service component and combatant commands. The Panel notes that both the 2007 study and the *2005 Strategic Planning Panel (SPP)* recommended a realignment and/or increase of legacy 4402 structure to reflect an increase in demand for legal support to Marine Corps operating forces and Joint commands, not tied to the Corps' planned increase in end-strength.

⁵⁵³ *Id.* at 1-2.

⁵⁵⁴ *See id.*

⁵⁵⁵ *Id.* at 1, 34, 51, 53, 73.

⁵⁵⁶ Letter from Staff Judge Advocate to the Commandant of the Marine Corps, *Subj: Judge Advocate Division Review of the Structure for Delivery of Legal Services in the Marine Corps*, 2 (30 Jul. 2007) [hereinafter SJA to CMC Letter of 30 Jul. 2007]; *see also* ALMAR 008/07, *supra* note 551.

⁵⁵⁷ SJA to CMC Letter of 30 Jul. 2007, *supra* note 556, enclosure (1).

In light of Congress's stated concern in mandating this Panel, it is worth noting here that the Marine Corps' plan to "grow the force" to 202,000 was to build infantry battalions and to reduce strain on MOSs that were experiencing a 1:1 deployment-to-dwell ratio or less.⁵⁵⁸ The judge advocate MOS community did not fall into this latter category; in fact, quite the opposite.⁵⁵⁹ With respect to the former, growing infantry battalions translates into growing the MOSs that are a structured requirement on a battalion T/O, as well as those forces required to recruit and train an additional 5,000 Marines a year. Neither of these necessarily requires judge advocates.⁵⁶⁰

5. Marine Corps Growth, Re-alignment, and Re-coding of Judge Advocate Structure

Consistent with the 2005 and 2007 studies discussed in Sections III.G.2. and III.G.4., *supra*, the Marine Corps took various actions to grow, re-align, and re-code judge advocate structure to better meet mission requirements.

a) Re-coding Previously Structured 4402 Billets

The Marine legal community, while maintaining the preference for generalists, recognized that the growing volume and complexity of legal issues facing the Marine Corps required judge advocates with additional expertise in specific practice areas. In May 2006, consistent with the recommendations of the 2005 *SPP*, the Marine Corps effected a change to the

⁵⁵⁸ See U.S. Senate, Committee on Armed Servs., *National Defense Authorization Act 2010 to Accompany S.1390* (S. Rpt. 111-35, § 541), Washington: Government Printing Office, 2009 (stating "The committee has questioned the Marine Corps' decision not to create additional judge advocate billets or increase judge advocate manning as part of its overall growth in active-duty end strength of 27,000 since 2007.").

⁵⁵⁹ E-mail from Captain John Russell, USMC, Judge Advocate Support, to Gunnery Sergeant Kenneth Emery, USMC (Aug. 23, 2010 EST 14:08) (with attachment "Deployment_by_MOSes.XLS").

⁵⁶⁰ This stands in contrast to the U.S. Army's simultaneous end-strength growth, which was accompanied by a significant growth in judge advocate requirements. The U.S. Army's planned growth in end-strength of 65,000, from 2007 to 2013, must be understood in the context of the Army's recent force modernization. Beginning in 2003, the Army transformed from a Division-centric force to a Brigade-centric force. This modernization, or transformation, required the U.S. Army to increase the number of its Brigade Combat Teams (BCTs) from 33 to 42. Further, it required the Army to increase the capability of its BCT headquarters, including adding a Brigade judge advocate in the grade of O-4 (major) and a Brigade Trial Counsel in the grade of O-3 (captain) to its BCT Table of Organization (T/O). As a result, when the Army planned its end-strength increase, like the Marine Corps, the Army focused on growing its combat maneuver units, specifically Brigade Combat Teams, from 42 BCTs to 48 BCTs. Further, since the Army's T/O for its BCTs includes two judge advocates, the planned end-strength increase necessarily included judge advocates. From 2003 to 2010, the active-duty judge advocate inventory in the U.S. Army increased from 1501 to 1823. Of that, 60% were captains, and 30% were majors.

MOS Manual to add six “Necessary MOSs” (NMOS) for judge advocates.⁵⁶¹ The re-coding of certain billets within the 4402 structure to require one of these six NMOSs, created the requirement that these billets be filled with judge advocates possessing the advanced education, experience, and training required to obtain these additional MOSs. In addition, the re-coding created the requirement to fund these billets at 100% manning during the development of the Authorized Strength Report (ASR). By June 2010, 32 structured 4402 and 4410 billets had been re-coded to various NMOSs.⁵⁶² In June 2010, another 22 structured 4402 billets were re-coded, all of them to the 4409 – Master of Criminal Law.⁵⁶³

b) Judge Advocate Division 2007 Structure Change Request

On July 30, 2007, the SJA to CMC submitted a request to the Commandant for changes to the 4402 structure, consistent with the recommendations of the 2007 Structure Review (i.e., 26 new billets, 10 re-coding, and 22 re-aligned). The request was routed through Counsel for the Commandant, Total Force Structure Division (TFSD), Marine Forces Command, and, eventually, in February 2008, the request was diverted into the then-recently announced Uncompensated Review Board (URB).

c) Judge Advocate Division 2008 Uncompensated Structure Request

In April 2008, the Judge Advocate Division (JAD) submitted a new request to the then-upcoming 2008 URB. This request included, as justification, not only the legacy deficiencies identified in the 2005 and 2007 studies, but also new requirements based on the growth of the Marine Corps to 202,000.⁵⁶⁴ This request reflected an analysis of how the planned active-duty population growth would affect the demand for military justice, legal assistance, and installation law services. Accordingly, this request included 34 new 4402 structured billets (8 more than the

⁵⁶¹ The six new Necessary MOSs (NMOSs) include: 4405 – Master of International Law, 4406 – Master of Environmental Law, 4407 – Master of Labor Law, 4408 – Master of Procurement Law, 4409 – Master of Criminal Law, and 4410 – Master of Law (General). Designation of the 4402 NMOSs requires advanced degrees and experience. See MCO 1200.17B, *supra* note 116, ¶ 1127 of enclosure (1), at 1-138 to -142.

⁵⁶² Total Force Structure Division, *NMOS Report for PMOS 4402* (Nov. 10, 2010). In 2013, the Marine Corps will have 12 billets in 4405, 9 in 4406, 7 in 4407, 4 in 4408, and 2 in 4410.

⁵⁶³ *Id.*

⁵⁶⁴ See Letter from Staff Judge Advocate to the Commandant of the Marine Corps to Uncompensated Review Board, *Subj: Judge Advocate Division Uncompensated Structure Request and Justification for the 2008 Uncompensated Review Board* (22 Apr. 2008).

2007 request), as well as the re-coding of 19 unstructured legal billets. The SJA to CMC briefed the URB on the request in May of 2008. The URB validated the requirement, but due to funding priorities the new structure was ultimately disapproved.⁵⁶⁵

d) Judge Advocate Division 2009 Uncompensated Structure Request

In 2009, another URB was conducted.⁵⁶⁶ JAD once again considered the findings of the 2007 review, as well as a revised analysis of requirements based on the growth of Marine Corps end-strength to 202,000, and requested the addition of 32 new structured 4402 billets.⁵⁶⁷ The URB once again validated the requirement, but due to funding priorities the new structure was again ultimately disapproved.

e) Headquarters, Marine Corps 2010 Capabilities Assessment Review

In spring 2010, a Capabilities Assessment Review (CAR) assessed personnel requirements and made recommendations for changes in structure. The CAR recommended the addition of 32 new 4402 billets to judge advocate structure. The Marine Corps approved these changes, and they will be added to the force structure in FY 15.⁵⁶⁸ However, the Marine Corps believes it will have the inventory on hand to fill these requirements by FY 14, and possibly as early as FY 13.⁵⁶⁹

⁵⁶⁵ Letter from Staff Judge Advocate to the Commandant of the Marine Corps to Uncompensated Review Board (URB), *Judge Advocate Division Uncompensated Review Board Request and Justification for the 2009 Uncompensated Review Board*, 3 (30 Mar. 2009) [hereinafter Letter from SJA to CMC to URB of 30 Mar. 2009] (chronicling the Judge Advocate Division's previous actions with respect to realigning and increasing the 4402 structure).

⁵⁶⁶ Message 160424Z JAN 09, MARADMIN 0031/09, *Subj: Policies and Procedures for the 2009 Uncompensated Review Board (URB)*.

⁵⁶⁷ See Letter from SJA to CMC to URB of 30 Mar. 2009, *supra* note 565; see also MajGen Ary Testimony, *supra* note 242, at 328-30 (stating that the reduction from 34 to 32 billets in 2009 reflected a decision to convert two of the original 34 billets requested to a requirement for two 4430 legal administration officers rather than filling all of the requirements with 4402 judge advocates); see also MajGen Ary Presentation, *supra* note 380, at 14.

⁵⁶⁸ See SES Applegate Testimony, *supra* note 155, at 135-36 (testifying that the current Force Structure Review Group (FSRG) would not re-consider the addition of the 32 structured 4402 billets, and that approval of those additions was a "done deal.").

⁵⁶⁹ *Id.* at 135.

f) Re-Coding Historically Unstructured Legal Billets

In 2009 JAD submitted, and TFSD approved, a Table of Organization and Equipment Change Request (TOECR) requesting to re-code all seven Marine Expeditionary Unit (MEU) SJA billets from PMOS 0530 – “civil affairs” to PMOS 4402 and BMOS (Billet Military Occupational Specialty) 4405. The changes will be reflected on unit T/Os in 2012.

In reviewing these studies, the Panel notes favorably: the Marine Corps’ efforts to actively manage legal requirements, including its use of a “bottom-up” structure review; careful assessment of increasing demands from operations and force growth; and, effective incorporation of the SJA to CMC as the Occupational Field Manager into the manpower process. The Panel further favorably notes the Marine Corps’ commitment to following through with this decision by building its inventory of active-duty judge advocates well ahead of the date on which the structure changes actually take effect.⁵⁷⁰

H. Manpower Recommendations by the JAG and the SJA to CMC

The Panel considered the manpower recommendations of the Judge Advocate General of the Navy (JAG) and the Staff Judge Advocate to the Commandant of the Marine Corps (SJA to CMC) regarding active-duty judge advocate manpower requirements in the Navy and the Marine Corps, respectively.

⁵⁷⁰ As was discussed in Section III.F., *supra*, and as will be discussed further in Section IV, *infra*, the Marine Corps has taken aggressive measures to maintain an appropriate inventory of judge advocates to meet structured and other requirements, including: increasing accessions by 71% since FY 08 (from 35 to 60 annually); offering 100% career designation; increasing the Law School Education Debt Subsidy by 50% in FY 11 (from \$30,000 to \$45,000 annually); and conducting two Return to Active Duty Boards in FY 10 and FY 11, returning 12 officers to active duty as judge advocates. As a result, the judge advocate inventory has improved from 75% of the O-1 to O-5 requirement in October 2009 to 94% of the O-1 to O-5 requirement in October 2010. Additionally, judge advocates were precepted as critically short on the FY 12 colonel selection board. ALNAV 074/10 announced that 11 Marine judge advocates had been selected by the FY 12 Selection Board for promotion to colonel. ALNAV 074/10, *supra* note 135. As of December 1, 2010 the Marine Corps’ judge advocate inventory was as follows:

Grade	4401 – Judge Advocate Student	4402 – Judge Advocate	Totals
O-1/O-2	67	18	85
O-3	26	211	237
O-4		124	124
O-5		78	78
O-6		30	30
Totals	93	461	554

The JAG assessed that the U.S. Navy required, as of September 2010, a total of 919 judge advocates on active duty to meet standing, baseline mission requirements (821 judge advocates) plus requirements relating to Individual Augmentees (IAs) and the Office of Military Commissions (OMC) (98 judge advocates). Subsequent to the JAG's submission, the combined IA/OMC requirements have grown from 98 to 105, which primarily reflect increased demands in Afghanistan and Pakistan. As of December 2010, then, the JAG assessed that the U.S. Navy needs a total of 926 judge advocates on active duty to meet total existing mission requirements.

The SJA to CMC assessed that the Marine Corps required, as of September 2010, a total of 398 judge advocates to meet structured legal requirements, as well as an additional number of judge advocates to meet broader Marine Corps requirements, resulting in a total target inventory of 520 judge advocates.

1. The JAG Assessment

The JAG advised the Panel that he developed his assessment of judge advocate requirements after being asked by senior Navy leadership “what is your assessment of what your community needs to do its job?”⁵⁷¹ Specifically, the JAG testified,

[W]hen I originally talked to Navy leadership, I did not present any specific numbers to them. . . . And after it was over, the comment was made to me, it would be helpful for us, leadership, if you would tell us what you think about it. It's interesting to know what the attorney ratios are across the Department of Defense; it is interesting to know what CNA came up with. It's interesting to know what sort of manpower assessments are done in the Bureau with respect to who's operational and who's support . . . but what we would really like to understand is, based on the benefit of your 30 years of active duty in the U.S. Navy, 25 years as a judge advocate and your position as a community leader now for four years, what is your assessment of what your community needs to do its job? . . . [T]hink about this in terms of a baseline for judge advocates, that if all your IA assignments and all your military commissions assignments went away tomorrow, how many judge advocates would you need to do your job?⁵⁷²

The JAG implemented the Navy leadership's tasking by taking the then-existing inventory of 830 active-duty judge advocates (early September 2010 inventory) and deducting

⁵⁷¹ VADM Houck Testimony, *supra* note 107, at 216.

⁵⁷² *Id.* at 216-17.

from that inventory 75 judge advocates who were then serving in IA assignments or at OMC.⁵⁷³ That left a non-IA/OMC “baseline” of 755 judge advocates on active duty as of September 1, 2010.⁵⁷⁴ The JAG then assessed whether that baseline was sufficient to meet the standing legal requirements faced by the Navy JAG Corps community, considering his personal observations of the workload across the community, his consultations with senior staff judge advocates in the field, and the inputs of senior fleet commanders.⁵⁷⁵

The JAG ultimately concluded that the baseline of 755 judge advocates was not sufficient to meet standing legal requirements, as it resulted in a judge advocate community that was working at an unsustainable pace, leaving work undone, and leaving the Department of the Navy to assume an unacceptable level of legal risk. He stated,

I believe the Department of the Navy is running risks with current JAG Corps manning. First, we must continue to improve the quality of our military justice mission. Moreover, commanders run the risk of failing to have important legal issues recognized, addressed, and accomplished in a timely manner. There is also a risk the analysis will lack rigor and ingenuity because existing assets are spread too thin. This is particularly relevant in light of the increasing demand trends for Navy JAGs in areas such as operational and international law, command advice, and support to Sailors and their families. To the extent JAGs are currently avoiding the legal risks noted above, they do so, in part, by working at an unsustainable pace, which will have an impact on retention and the quality of our manpower, particularly in light of law school debt and civilian employment options.⁵⁷⁶

The JAG identified three categories or levels of legal risk: risks to the Navy, risks to the Joint force, and risks to the JAG Corps itself.⁵⁷⁷ For the Navy, the risks include: courts-martial cases poorly prosecuted or defended; reduced fleet training due to loss of range access; reduced fleet operational capabilities due to restrictions on use of sensors; delays in fielding weapons or cyber capabilities; delays in executing global basing plans; Sailors falling prey to predatory lenders or deploying without wills and powers of attorney; and backlogs in disability evaluation

⁵⁷³ VADM Houck Testimony, *supra* note 107, at 217-18; VADM Houck Presentation, *supra* note 4, at 75; *see* VADM Houck Letter (Ser 00/0102), *supra* note 94.

⁵⁷⁴ VADM Houck Testimony, *supra* note 107, at 217-18; VADM Houck Presentation, *supra* note 4, at 75; VADM Houck Letter (Ser 00/0102), *supra* note 94.

⁵⁷⁵ VADM Houck Testimony, *supra* note 107, at 226-27.

⁵⁷⁶ VADM Houck Letter (Ser 00/0102), *supra* note 94, at 2; *see also* VADM Houck Testimony, *supra* note 107, at 187-92; VADM Houck Presentation, *supra* note 4, at 70.

⁵⁷⁷ VADM Houck Presentation, *supra* note 4, at 70.

cases, courts-martial, military promotions, and claims adjudications.⁵⁷⁸ For the Joint force, the risks include: restrictions on military activities in exclusive economic zones (which constitute 40% of the world's oceans); loss of, or degraded, freedom of navigation and overflight; infringement on sovereign immunity of warships, auxiliaries, and military aircraft; restrictions on use of unmanned systems and sensors; potential increases in violations of international law including the law of armed conflict; and ambiguous rules of engagement.⁵⁷⁹ For the JAG Corps itself, the risks include: an inability to recruit and retain the best officers; degraded abilities to educate, train, and mentor judge advocates; and stress on the force.⁵⁸⁰

The JAG next identified – command by command – the minimum numbers of additional judge advocates required to execute standing, non-IA/OMC legal missions within an acceptable level of risk. The JAG concluded that an additional 66 judge advocates were required, broken down into the following major organizational divisions: 26 to serve in SJA assignments at fleet commands, 28 to serve within the Naval Legal Service Command (NLSC), 7 to serve within the Office of the Judge Advocate General (OJAG), and an additional 5 to attend post-graduate education programs.⁵⁸¹ Within the SJA segment, all the additional billets will support operational law requirements, with emphasis in the Pacific, European, and African areas of responsibility and functional areas of special warfare, cyber, maritime security operations, and operational environmental law. Within the NLSC segment, the emphasis was on building command services and legal assistance capacities in specific locations in which the Navy has recently increased its presence or footprint, improving the Trial and Defense Counsel Assistance Programs, and improving the quality and breadth of instruction at Naval Justice School. Within the OJAG segment, the emphases are on improving military justice oversight and inspection capacity, improving the Navy-Marine Corps Court of Criminal Appeals, and building expertise and reach-back capabilities within the cyber and environmental law divisions.

To recap, in the JAG's best professional judgment, the Navy requires 821 judge advocates, at minimum, to execute standing legal missions within an acceptable level of risk. To that minimum standing baseline of 821 active-duty judge advocates, the JAG assessed that he

⁵⁷⁸ *Id.*

⁵⁷⁹ *Id.*

⁵⁸⁰ *Id.*

⁵⁸¹ VADM Houck Letter (Ser 00/0102), *supra* note 94, at 1.

requires 105 judge advocates to meet and sustain current IA and OMC requirements.⁵⁸² In sum, according to the JAG's calculations, as of December 2010 the Navy requires 926 judge advocates on active duty to execute both the standing legal missions assigned and the IA and OMC requirements.⁵⁸³ Notably, the JAG's assessment does not forecast future requirements; rather, it reflects the minimum manpower number that he believes is currently required in the JAG Corps community.

2. The SJA to CMC Assessment

The SJA to CMC explained to the Panel that “The Marine Corps must maintain a total inventory of judge advocates on active duty sufficient to fulfill the manpower requirements of both the Marine legal mission and those of the greater Marine Corps.”⁵⁸⁴ The breadth of roles performed by Marine judge advocates includes, he explained, “service-level legal requirements, departmental and joint legal billets, career broadening ‘B-billets,’ schools (both legal and PME) and command.”⁵⁸⁵ The SJA to CMC further stated that an additional number of judge advocates in a patient, prisoner, transient and trainee (P2T2) status are required in order to maintain this inventory.⁵⁸⁶ The SJA to CMC explained that the actual inventory, as well as the target inventory (i.e., the Grade Adjusted Recapitulation (GAR)), fluctuates based on continuous re-evaluation and adjustment to the required force structure to meet legal requirements, a proportionate share of B-Billets that is cognizant of the health of the 4402 community, and a number of P2T2 to ensure a sufficient education and training pipeline.⁵⁸⁷ In his testimony to the Panel, the SJA to CMC recommended that the Marine Corps should plan to a target inventory of 520 judge advocates in order to meet the requirements for a structure of 398 judge advocate billets and a corresponding number of P2T2 and proportionate share B-Billets.⁵⁸⁸

⁵⁸² As noted earlier, the JAG's September 2010 assessment was 98 judge advocates to cover IAs and OMC; however, subsequently the IA requirements have grown and the total IA and OMC requirements as of December 2010 are 105.

⁵⁸³ The JAG noted on September 1, 2010 that 32 reserve judge advocates have been recalled to active duty to help fulfill the IA and OMC requirements and that, on an annual basis, 34 reserve judge advocates were required to sustain the reserve IA and OMC billets. VADM Houck Presentation, *supra* note 4, at 50, 52; see VADM Houck Letter (Ser 00/0102), *supra* note 94, at 1.

⁵⁸⁴ SJA to CMC Submission, *supra* note 38, at 6.

⁵⁸⁵ *Id.*

⁵⁸⁶ *Id.* at 6-7.

⁵⁸⁷ See SJA to CMC Submission, *supra* note 38, at 6-13; see MajGen Ary Presentation, *supra* note 380, at 11.

⁵⁸⁸ SJA to CMC Submission, *supra* note 38, at 6-7; see also MajGen Ary Presentation, *supra* note 380, at 11.

Subsequently, the Marine Corps has informed the Panel that the forecasted structure over the next 5 years will level out at 376, plus an additional 32 billets in FY 15, for a total structure of 408 through FY 16. In addition, the Marine Corps has determined that over the next five years to maintain an inventory to meet the requirements for 376 structured 4402 billets, plus appropriate B-Billets and P2T2, requires a GAR of at least 530. Adding the approved 32 structured billets in FY 15, and a corresponding increase in B-Billets and P2T2 requirements, brings this targeted inventory or GAR to over 550 for the next 5 years.

I. Panel's Manpower Conclusions

It is the view of the Panel that the Department of the Navy, today, requires approximately 950 active-duty U.S. Navy judge advocates and a target inventory of approximately 550 active-duty Marine judge advocates⁵⁸⁹ to fulfill the legal mission of the Department. The Marine Corps target inventory is based on a recommended minimum of 400 structured Service, Department, and Joint legal billets,⁵⁹⁰ a proportionate number of “B-Billets” (non-legal billets), and a sufficient number of “P2T2” billets⁵⁹¹ to ensure community health and proper career progression.⁵⁹²

The results of the Marine Corps's bottom-up, top-down, requirements-driven manpower determinations, along with the studies directed by the SJA to CMC, proved realistic and useful in the Panel's determination of judge advocate requirements within the Marine Corps. The Panel applauds the recent steps taken by the Marine Corps to increase both the number of structured judge advocate billets and its inventory of judge advocates on active duty.⁵⁹³ The Panel believes that the Marine Corps' programmed target inventory of approximately 550 active-duty judge

⁵⁸⁹ The Panel notes that as of the date of this report, the Marine Corps' judge advocate inventory has grown to 554, consistent with the recommended target inventory of at least 550.

⁵⁹⁰ The Panel notes that this forecasted structure of 408 reflects the programmed loss at the end of FY 12 of 13 billet requirements within Office of Military Commissions (OMC). Should the OMC requirement remain after FY 12, then the required structure will be increased to 421 through FY 16.

⁵⁹¹ The Panel notes that included in the category of “P2T2” are “trainees,” which consist mainly of Marine officers who are designated 4401 “judge advocate students” until they complete training and are subsequently designated by the JAG, and assigned by the Commandant, the MOS 4402 “judge advocate.” As a result, the total target inventory of over 550 includes 4402s and 4401s.

⁵⁹² As discussed in Section II, *supra*, the target inventory is a result of the Grade Adjusted Recapitulation (GAR) determination.

⁵⁹³ The Marine Corps increased its 4402 structure by 38 billets, from 340 in FY 06 to 378 in FY 11, and will further increase its 4402 structure by another 32 billets by FY 15.

advocates over the next five years will be sufficient to fulfill the legal requirements of the Marine Corps. More specifically, the Panel believes that the target inventory will allow Marine judge advocates to continue to serve in non-legal billets in order to maintain their role as well-rounded, Marine Air-Ground Task Force officers and to contribute to the greater Marine Corps mission.

The Panel cautions that Marine judge advocate manpower requirements may increase if: (1) there is a significant increase in the military justice mission, which some witnesses believe might occur when Marines currently deployed to Afghanistan return to garrison; (2) structured operational law requirements continue to increase at or near the same rate as has been experienced since September 11, 2001; or (3) as recommended, the SJA to CMC is provided statutory or regulatory authority to supervise the administration of military justice and legal assistance in the Marine Corps, and to exercise professional and technical supervision over Marine judge advocates.⁵⁹⁴ The Panel also recognizes that judge advocate manpower requirements in the Marine Corps could be affected if there is a significant reduction in Marine Corps total officer and enlisted end-strength. On this last point, the Panel wishes to emphasize that overall legal requirements do not necessarily or directly correlate to force structure or total end-strength.

In contrast to the Marine Corps – which is implementing a process of structured growth within its judge advocate community – the U.S. Navy is planning to reduce its judge advocate community.⁵⁹⁵ The U.S. Navy finished FY 10 with 811 active-duty judge advocates, and has programmed a reduction in authorized end-strength over the next five years, from 801 in FY 11 to 747 in FY 16.

The JAG provided the Panel a comprehensive, command-by-command analysis of judge advocate requirements across the entire Navy, including support to Joint commands. The JAG

⁵⁹⁴ To properly execute these additional supervisory functions, the SJA to CMC would require a more robust Service headquarters organization (i.e., Judge Advocate Division (JAD)), particularly within the practice area of military justice.

⁵⁹⁵ As discussed in Section III.H.1., *supra*, the JAG testified to the Panel that in preparing for his testimony to the Panel, he was invited by the senior U.S. Navy leadership to conduct his own best professional assessment of judge advocate requirements, which led to his assessment that the Navy requires 926 judge advocates on active duty today. The Panel recognizes that the senior Navy leadership appears open to changing its programming for active-duty judge advocate end-strength over the Future Years Defense Program (FYDP). VADM Houck Testimony, *supra* note 107, at 216-17.

assessed that there is a current requirement for 926 judge advocates on active duty in the U.S. Navy. The Panel views the JAG's assessment favorably, and recognizes that he is uniquely qualified to conduct a professional assessment of judge advocate manpower requirements in the U.S. Navy, based on his experiences in command and other senior leadership positions.

The Panel also recognizes that the JAG's assessment must be considered in the context of the severe budget climate facing the Department of the Navy. In this regard, the Panel notes that the JAG's assessment was intentionally conservative, designed to address the minimum requirements extant today. The JAG did not address likely future requirements, such as: additional Individual Augmentation (IA) growth in Afghanistan, Pakistan, and elsewhere; additional manpower requirements that will arise for the U.S. Navy if the Department of the Navy decides to affirmatively provide counsel to all Wounded, Ill, or Injured Sailors at the earliest stages of the Disability Evaluation System (as is currently being done by the Army and Marine Corps); additional manpower requirements that will arise if the U.S. Navy establishes an independent Trial Defense Command; additional permanent operational law requirements that, as the Panel concluded earlier, are continuing to increase at a rate that, unless arrested, will result in another approximate doubling of operational law requirements over the next decade. Thus, while the Panel believes the JAG's assessment of 926 U.S. Navy judge advocates is an accurate description of the requirement today, the Panel also believes that the judge advocate requirement over the next five years will be larger than 926.

The Panel is of the view that over the next five years, the U.S. Navy will be required to make judge advocate manpower investments beyond those identified by the JAG in the following areas: supervising the administration of military justice, supporting cyber law, supporting the special operations community, supporting rule of law missions, filling increasing IA demands in Afghanistan and Pakistan, responding to operational environmental law demands, and supporting efforts to maintain stability and navigational freedoms in the Western Pacific. The Panel emphasizes that it, like the JAG, is intentionally being conservative in its assessment in the face of the severe budget climate in the DoD. Beyond these additional requirements, the Panel believes that increased judge advocate requirements to support the Disability Evaluation System and to further improve the independent trial defense function in the U.S. Navy, although contingent, are likely. The Panel concludes that the JAG's assessment that 926 judge advocates

are required today will have to be adjusted upward to approximately 950 U.S. Navy judge advocates by 2015.

In reaching its conclusion regarding a future requirement for 950 U.S. Navy judge advocates, the Panel was also informed by the Center for Naval Analyses (CNA) study. While the *CNA Study* is now dated and has some reliability issues, it provided additional and useful support in the Panel's assessment of U.S. Navy judge advocate manpower requirements. The *CNA Study* remains the first and most detailed analysis of U.S. Navy judge advocate requirements ever conducted. It was co-sponsored by the Chief of Naval Personnel, adopted the U.S. Navy's official methodology for Budget Submitting Offices (BSOs) to conduct manpower determinations (i.e., measuring workload to accomplish validated missions, functions, and tasks), and applied that methodology across BSOs to calculate community-wide requirements.

Option 5 of the *CNA Study* calculated manpower requirements for a postulated “post-2003” constant level court-martial caseload, using a nominal 45-hour workweek, which CNA noted is the Federal average for government attorneys.⁵⁹⁶ Using the then-extant baseline of 750 active-duty U.S. Navy judge advocates, CNA assessed that an additional 119 judge advocates were required to accomplish the assigned legal missions within an acceptable level of risk. The “option 5” total is 869 judge advocates. The Panel notes that CNA did not add to that 869 total, any judge advocate requirements for Individual Augmentees (IA) or the Office of Military Commissions (OMC). The Panel also notes that CNA underestimated both the decline in court-martial and the growth in operational law. That noted, if one were to add today's existing sustainment requirements for IAs and OMC (105) to CNA's option 5 total (869), one could conclude that the U.S. Navy requires 974 judge advocates on active duty. The Panel emphasizes that it is not relying on the *CNA Study* to conclude that the U.S. Navy requires 974 active-duty judge advocates; rather, the Panel is noting that its own estimate that U.S. Navy judge advocate requirements will grow to approximately 950 over the next five years is certainly within the more conservative range of options presented by CNA several years ago.

The Panel also recalls the benchmarking to the Departments of the Army and the Air Force noted in Section I.D., *supra*, of the report. We caution that Inter-Departmental and Inter-

⁵⁹⁶ CNA Presentation, *supra* note 502, at 15.

Service comparisons of legal manpower are of limited utility given that the roles and missions of the legal communities are not identical. However, the Panel believes that such benchmark comparisons are useful in that the size of the legal communities in the Army and Air Force may represent an outer boundary or high end in force structure analysis. As we noted in Section III.A., *supra*, if the Department of the Navy had the same ratio of full-time attorneys to active-duty end-strength as the Department of the Army, the U.S. Navy would have 1,205 active-duty judge advocates, and if it had a ratio like the Department of the Air Force, the U.S. Navy would have 1,077 active-duty judge advocates. While the Panel is not concluding that there is a requirement for 1,205, or even 1,077, active-duty judge advocates in the U.S. Navy, the Panel is noting that its conclusion that the U.S. Navy requires 950 active-duty judge advocates today is well within the outer boundary reflected in the requirements for the Department of the Air Force and the Department of the Army.

The Panel concludes its assessment of judge advocate requirements in the Department of the Navy by emphasizing three points, two of which apply generally to the U.S. Navy and the Marine Corps, and the last of which applies only to the U.S. Navy.

First, while it is difficult to predict future judge advocate manpower requirements given the uncertain nature of future wartime demands and the existing DoD budget climate, the Panel believes, based on its review of the 2010 *Quadrennial Defense Review* and other strategic documents, as well as the testimony it received, that requirements for judge advocates in the U.S. Navy and the Marine Corps will continue to grow over the next five years, particularly in the area of operational law. This will likely be the case, despite the projected redeployment of all U.S. military forces from Iraq by the end of 2011, and the eventual redeployment of U.S. combat forces from Afghanistan.

Second, while the numbers of general and special courts-martial declined over the last decade within the Department of the Navy, and particularly in the U.S. Navy, that decline does not directly correlate to a proportionate reduction in manpower requirements. There are certain inviolate “fixed costs” in operating a comprehensive military justice system worthy of our men and women in uniform, such as maintaining independent trial and appellate judiciaries; maintaining a Naval Justice School to educate and train judge advocates, legal officers, and line

officers; maintaining cadres of qualified military counsel capable of trying complex cases; and maintaining SJA offices that have the capacity to effectively discharge military justice responsibilities despite competing wartime demands. The Panel notes, for example, that both the Marine Corps legal community and the U.S. Navy JAG Corps are likely going to have to make additional manpower investments in the supervision of the administration of military justice to fully implement the recommendations made by the DoD Inspector General (IG) in its report of post-trial processing.

Third, given the existing publicly available budgetary programming authorizations for the Navy JAG Corps over the next five years, the Panel concludes that there will be a significant shortage of active-duty judge advocates in the U.S. Navy by 2015. The Panel is concerned that the U.S. Navy JAG Corps – despite its superb leadership – may be approaching a tipping point. The legal mission is increasing despite a shortage of active-duty judge advocates in the Navy right now,⁵⁹⁷ and that shortage will worsen if existing manpower programming is not revised. In the Panel's view, the current shortage poses a significant level of legal risk to the Department of the Navy and the Joint Force, and a significant level of professional risk to the Navy JAG Corps. The Panel strongly recommends that the Department of the Navy and the U.S. Navy act to mitigate these risks.

⁵⁹⁷ The 17% shortage is calculated based on FY 10 end-strength (811) and the Panel's assessment of a requirement for 950 judge advocates.

IV. Review of Career Patterns for Marine Judge Advocates

The Panel was directed to “review career patterns for Marine Corps judge advocates in order to identify and validate assignments to nonlegal billets required for professional development and promotion.”⁵⁹⁸

As part of its review, the Panel received the testimony of the SJA to CMC, as well as: Col John R. Ewers, USMC, Deputy SJA to CMC; and Senior Executive Service (SES) Michael F. Applegate, Director, Manpower Plans and Policies Division, Manpower and Reserve Affairs, Headquarters, Marine Corps. The Panel also considered written submissions, as well as Department and Service regulations, orders, and messages.

A. Every Marine a Rifleman, Every Marine Officer a MAGTF Officer

Central to the ethos – to the very self-perception – of the Marine Corps is the premise that “every Marine is a rifleman” and every Marine officer is a Marine Air-Ground Task Force (MAGTF) officer.⁵⁹⁹ The force structure of the Corps reflects its central purpose: amphibious, expeditionary warfare. Because of its expeditionary nature, the Corps is also austere. This austerity places a premium on the role of every Marine,⁶⁰⁰ which in turn drives the Marine Corps’ approach to developing and assigning judge advocates.

Unlike their JAG Corps counterparts in the Navy, Army, and Air Force, Marine judge advocates are unrestricted line officers and undergo the same rigorous indoctrination and training as all other Marine officers. Just like all prospective Marine Corps officers, prospective Marine judge advocates must first earn a commission as a second lieutenant by successfully completing the Officer Candidate Course at Officer Candidates School (OCS) in Quantico, Virginia. The mission of OCS is “to train, evaluate, and screen officer candidates to ensure they possess the moral, intellectual, and physical qualities for commissioning, and the leadership potential to

⁵⁹⁸ National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111-84, § 506(b)(2)(F), 123 Stat. 2190 (2009).

⁵⁹⁹ MajGen Ary Testimony, *supra*, note 242, at 339.

⁶⁰⁰ Carl E. Mundy, Jr., *Every Marine a Rifleman*, Marine Corps Gazette, Jan. 1993, at 12.

serve successfully as company grade officers in the Operating Forces.”⁶⁰¹ All Marine officers, including judge advocates, must then complete the Basic Officer Course at The Basic School (TBS) in Quantico, Virginia. The mission of TBS is to “train and educate newly commissioned or appointed officers in the high standards of professional knowledge, esprit-de-corps, and leadership required to prepare them for duty as company grade officers in the operating forces, with particular emphasis on the duties, responsibilities and war-fighting skills required of a rifle platoon commander.”⁶⁰² TBS is a demanding six-month program that provides each lieutenant with the foundation to be a rifle platoon commander.

The importance of this MAGTF officer foundation for Marine judge advocates was a recurring theme throughout much of the testimony received by the Panel, and came from senior operational commanders as well as senior members of the Marine Corps Legal Services community. Lieutenant General (LtGen) Richard F. Natonski, USMC (Ret.), former Commanding General of the 1st Marine Division, testified that the Marine judge advocate’s MAGTF officer foundation was “Absolutely critical.”⁶⁰³ He spoke specifically about the Marine judge advocate’s ability, in the operational law realm, to “speak like a lance corporal, and understand what a lance corporal faces and then develop scenarios that a lance corporal could understand.”⁶⁰⁴ He concluded by stating, “Having a lawyer that understands the culture . . . is critical in our culture and in the credibility of our judge advocates.”⁶⁰⁵

During his testimony, LtGen John F. Kelly, USMC, former Commanding General of I Marine Expeditionary Force (Forward), was asked why Marine judge advocates couldn’t be like the doctors, chaplains, or nurses, who are staff officers in the Navy who may be assigned to a Marine Corps unit.⁶⁰⁶ In answering that question, LtGen Kelly spoke about the expeditionary nature of the Marine Corps and the fact that there are no rear areas on the battlefield where Marines are assigned.⁶⁰⁷ He added, “you can’t always bet that you won’t get attacked or overrun or something like that in the theater, and . . . when [Marine judge advocates] did get hit, I had no

⁶⁰¹ <http://www.ocs.usmc.mil/?dest=home>.

⁶⁰² <http://www.tecom.usmc.mil/tbs/>.

⁶⁰³ LtGen Natonski Testimony, *supra* note 230, at 37.

⁶⁰⁴ *Id.* at 38.

⁶⁰⁵ *Id.* at 39.

⁶⁰⁶ RADM James E. McPherson, JAGC, USN (Ret.), Member, Independent Review Panel to Study the Judge Advocate Requirements of the Department of the Navy, Transcript of October 13, 2010 Hearing, at 65.

⁶⁰⁷ See LtGen Kelly Testimony, *supra* note 198, at 65-68.

second thought.”⁶⁰⁸ As Col John R. Ewers, USMC, Deputy SJA to CMC put it, “there’s an assumption you can make about a Marine officer and the capability he brings on the battlefield . . . whether he’s a lawyer or something else.”⁶⁰⁹ This confidence is borne out of the Marine judge advocate’s initial training as a basic rifle platoon commander and is reinforced by a balanced career which allows them to mature into well-rounded MAGTF officers.

B. Assignment to Non-Legal Billets

“There is no ‘standard’ career pattern; many Marine judge advocates have had successful careers with almost exclusively legal assignments, while others have served in a number of billets outside of the legal community during the course of a successful career.”⁶¹⁰ During his testimony, Major General (MajGen) Vaughn A. Ary, Staff Judge Advocate to the Commandant of the Marine Corps (SJA to CMC), stated that a Marine judge advocate could expect to spend approximately 20 months of a 20-year career assigned outside of judge advocate billets.⁶¹¹ These outside assignments may include assignments to non-legal “B-Billets,” completion of formal courses of Professional Military Education (PME),⁶¹² and tours as commanding officers.

Congress has indicated concern that “proposed near-term solutions, such as immediate termination of assignments of judge advocates to career enhancing, non-legal billets, will adversely affect the professional development and promotions of mid-level Marine Corps judge advocates . . .”⁶¹³ From both a force structure and a cultural perspective, the Panel does not recommend this “solution,” nor does it appear that the Marine Corps leadership, either within or outside of the legal services community, intends to head in that direction.

⁶⁰⁸ *Id.* at 66.

⁶⁰⁹ Col Ewers Testimony, *supra* note 155, at 123-24.

⁶¹⁰ SJA to CMC *Submission*, *supra* note 38, at 44.

⁶¹¹ MajGen Ary Testimony, *supra* note 242, at 305. MajGen Ary clarified that the approximation of 20 months was not arrived at through scientific calculation, but rather through an informal poll conducted by the Judge Advocate Division among presently-serving judge advocates in the grades of lieutenant colonel and above. *Id.*

⁶¹² See generally MCO 1553.4B, *supra* note 491 (explaining the Marine Corps’ PME program). The Marine Corps Professional Military Education (PME) program specifies required knowledge, by area, at each career level. Participation in the PME program is an institutional expectation. The Marine Corps PME program consists of resident instruction as well as distance education. A competitive board process is used to select individuals who will attend resident PME courses, and judge advocates have been selected at roughly the same percentage as their peers in other specialties. SJA to CMC *Submission*, *supra* note 38, at 46.

⁶¹³ U.S. Senate, Committee on Armed Servs., *National Defense Authorization Act 2010 to Accompany S.1390* (S. Rpt. 111-35, § 541), Washington: Government Printing Office, 2009.

During his testimony, SES Applegate, Director, Manpower Plans and Policies Division, explained,

Where that [solution] ultimately wouldn't work in the way we do business is that right now I have six [judge advocates] in command and 22 in PME schools and 43 in non-lawyer billets, which adds up to 70. If we stop doing that, I would reduce the inventory by 70 lawyers. I wouldn't make 70 extra lawyers because I wouldn't need them. The lawyer requirement has to go up for me to build more lawyers to fill lawyer billets because I'm already building enough lawyers to have the inventory to fill the non-lawyer billets.⁶¹⁴

As illustrated in the Table 14, below, since combat operations began in Iraq in 2003, the opportunity for judge advocates to serve in “free B-Billets” (billets that can be filled by any officer, regardless of Military Occupational Specialty (MOS)) has steadily increased. This increase is due in part to the fact that other MOS communities, particularly the combat arms communities, had greater rates of deployment, and less dwell time, and therefore needed relief from the requirement to fill free B-Billets. As a result, Manpower and Reserve Affairs (M&RA), Manpower Management (MM) adjusted their staffing goals to assign increasing shares of free B-Billets to other MOS communities, including judge advocates.⁶¹⁵

	2003	2004	2005	2006	2007	2008	2009	2010
Total Free B-Billets Filled by Judge Advocates	28	26	30	34	32	40	35	40
% of Judge Advocate Inventory in Free B-Billet	6.44%	6.27%	7.14%	8.25%	7.51%	9.93%	8.86%	9.24%
Judge Advocate Free B-Billets as a % of all USMC Free B-Billets	1.64%	1.68%	1.78%	1.94%	2.04%	2.44%	1.97%	2.35%

Table 14. Judge Advocate Assignments to, and Share of Free B-Billets

The SJA to CMC emphasized his commitment, and the Commandant's commitment,⁶¹⁶ to continue applying the Marine Corps ethos that “every Marine is a rifleman” to the legal

⁶¹⁴ SES Applegate Testimony, *supra* note 155, at 137.

⁶¹⁵ Col Ewers Presentation, *supra* note 497, at 4.

⁶¹⁶ At the time of MajGen Ary's testimony to the Panel, the Commandant of the Marine Corps was General James T. Conway, USMC.

services community by continuing to assign judge advocates to non-legal billets.⁶¹⁷ MajGen Ary, SJA to CMC, stated, “It’s critical for us as a community to remain inextricably intertwined with the community we support, and we want to do that.”⁶¹⁸ Approximately one month prior to becoming the 35th Commandant of the Marine Corps, General James F. Amos stated that he agreed with the existing Commandant’s position on assigning judge advocates to non-legal billets, asserting,

The opportunity to serve in command, operational and other non-legal billets is essential to the development of Marine judge advocates. We both consider, and are of the firm opinion, that our judge advocates are unrestricted line officers. For the past 50 years, we have maintained this approach because we believe service in non-legal billets makes our judge advocates better Marine officers and better legal advisors . . . [A] common culture and philosophy, gained through shared professional background, experiences and hardships, builds comradeship – an essential component to establishing trust between Commanders and their judge advocates. In short, service in non-legal billets ensures that our judge advocates are fully integrated and enhances their credibility.⁶¹⁹

C. Promotion and Command Selection

Marine judge advocates are expected to have a career path that includes assignments to operational units, expeditionary tours, and non-legal billets, as well as completion of formal courses of PME for each rank. Practically, however, these varied career paths are more than expectations. Unlike the Army, Navy, and Air Force JAG Corps, which have separate promotion boards for lawyers, Marine judge advocates compete head-to-head as Marine officers against their peers from other MOSs. The standard precept language requires selection of those “best and fully qualified”⁶²⁰ from all MOSs.⁶²¹

⁶¹⁷ MajGen Ary Testimony, *supra* note 242, at 139-40.

⁶¹⁸ *Id.* at 140.

⁶¹⁹ U.S. Senate Armed Servs. Committee, *Advance Policy Questions for General James F. Amos, USMC, Nominee for Commandant of the Marine Corps*, 24 (21 Sep. 2010).

⁶²⁰ U.S. Dep’t of Defense, Instr. 1320.14, *Commissioned Officer Program Procedures*, ¶¶ 6.2.3.4.6., E4.1.7.6., at 11, 19 (Sep. 24, 1996) (requiring the following promotion selection board certification: “That the officers recommended for promotion are . . . fully qualified and best qualified for promotion to meet the needs of the Armed Force concerned . . . among those officers whose names were furnished to the board.”). Note that some boards select only to the “fully qualified” standard, in which case the certification should reflect that standard. *Id.* ¶ 6.2.3.4.6., at 11. A majority of the members of promotion selection boards convened under 10 U.S.C. § 611(a) (2010) and 10 U.S.C. § 14101 (2010) must certify that “the officers recommended for promotion by the board are best qualified for promotion to meet the needs of the armed force concerned . . . among those officers whose names were furnished to the selection board.” 10 U.S.C. §§ 617, 14109 (2010); *see also* 10 U.S.C. § 5947 (2010)

As Table 15, below, illustrates, Marine judge advocates have historically been very successful on promotion boards. Over the past six years, the in-zone selection rates of judge advocates to the grades of major and lieutenant colonel compared very well with the overall averages for all occupational fields and significantly exceeded the overall selection average in all but one of the boards listed below (FY 09 major board). For colonel, the selection rate has been less competitive with that of other communities, with three years significantly below the overall average (FY 07, FY 08, and FY 09). Although the above-zone selections and the FY 10 board, which included a precept identifying a critical shortage of 4402 colonels, made up for some of the shortfall, the Marine Corps remained short of the required number of 4402 colonels.⁶²² Accordingly, a similar precept was included in the FY 12 colonel board, and the results from that board showed a noteworthy improvement in the selection rate for 4402 colonels.⁶²³

	Major 4402	Major All MOSs	LtCol 4402	LtCol All MOSs	Colonel 4402*	Colonel All MOSs
FY 12	<i>NOT YET RELEASED</i>				64.3% (9/14) [2]	52.1%
FY 11	87.1% (27/30)	82.8%	81.8% (15/22)	65.6%	50.0% (2/4) [0]	53.6%
FY 10	90.6% (29/32)	87.6%	88.9% (16/18)	71.8%	64.3% (9/14) [1]	53.4%
FY 09	78.4% (29/37)	87.0%	90.9% (10/11)	70.6%	33.3% (4/12) [2]	50.5%
FY 08	90.0% (18/20)	87.4%	82.4% (14/17)	65.0%	12.5% (1/8) [1]	51.0%
FY 07	90.0% (27/30)	86.5%	75.0% (9/12)	62.4%	23.5% (4/17) [0]	48.4%
FY 06	92.9% (26/28)	86.7%	78.9% (15/19)	67.2%	80.0% (4/5) [1]	50.8%
* Bracketed numbers in this column indicate above-zone selections (officers who had been previously considered for promotion); the bracketed numbers are not included in selection percentages.						

Table 15. Marine Corps Officer In-Zone Promotion Rates⁶²⁴ (4402 v. All MOSs)

(requiring that “All commanding officers and others in authority in the naval service” behave with exemplary conduct).

⁶²¹ MajGen Ary Testimony, *supra* note 242, at 351.

⁶²² *See id.* at 336-37, 350-51.

⁶²³ *See* ALNAV 074/10, *supra* note 135.

⁶²⁴ Col Ewers Presentation, *supra* note 497, at 8. Manpower Management Promotion Branch (MMPR) provided FY 12 statistics.

Marine Corps colonels, colonel selects, lieutenant colonels, and lieutenant colonel selects are eligible to be screened for command. Annual Command Screening Boards identify those officers who are best and fully qualified to meet commanding officer requirements in the operating forces and the supporting establishment. Because the Marine Corps has not established an expected or preferred career pattern for officers, assignments to the operating forces, recruiting duty, joint and external billets, the training community, and the supporting establishment all contribute to the depth and breadth of experience that are critical to the Marine Corps. The Command Screening Boards consider that all assignments are important to the Marine Corps, and that successful performance of assigned duties is the key to measuring an officer's potential.⁶²⁵ Marine judge advocates have historically been very competitive on Command Screening Boards.⁶²⁶

The high rates of selection for promotion to field grade rank and command is a testament not only to the quality of Marine officers serving as judge advocates, but also to the level of integration of judge advocates into the professional cadre of Marine officers.

The assignment of Marine judge advocates to non-legal billets is not merely required for professional development and promotion, but is inextricably tied to what it means to be a Marine officer.⁶²⁷ The Panel finds persuasive the testimony from senior judge advocates and operational commanders that having Marine judge advocates as unrestricted line officers, serving in command, operational, and other non-legal billets, makes them better Marine officers and better legal advisors.

⁶²⁵ U.S. Marine Corps Order 1300.64A, *Command Screening Program (CSP)*, ¶ 8.c., at 4 (23 Jun. 2004).

⁶²⁶ SJA to CMC *Submission*, *supra* note 38, at 46.

⁶²⁷ In response to a Panel member's question about the potential impact on the Marine legal services community if it was decided to unilaterally do away with assignments to non-legal billets, Col Ewers, USMC, Deputy Staff Judge Advocate to the Commandant of the Marine Corps, stated that, "It would fundamentally change what it is that we do . . . it would completely change the complexion of the way that we look at the Marine Corps and the people that we attract." Col Ewers Testimony, *supra* note 155, at 157-58.

V. Review of Directives Pertaining to Jointly-Shared Missions

The Panel was directed to “review directives issued by the Navy and the Marine Corps pertaining to jointly-shared missions requiring legal support.”⁶²⁸

The Department of the Navy is unique from the Departments of the Army and Air Force, in that it oversees two Services: the U.S. Navy and the U.S. Marine Corps. One consequence of this shared Department is that the Navy and Marine Corps, along with their judge advocate communities, share a common mission to support the Department of the Navy and are subject to the oversight and direction of one Secretary.

While the Panel found no U.S. Navy or Marine Corps directives specifically pertaining to “jointly-shared missions requiring legal support,” the Panel did find a foundation of directives issued by the Secretary of the Navy and the Judge Advocate General of the Navy (JAG) providing guidance to both Navy and Marine judge advocates in the execution of their legal duties. In addition, the Panel found evidence of the three legal communities’ commitment to jointly share the common mission of providing legal support to the Department of the Navy.

The Judge Advocate General of the Navy and the Staff Judge Advocate to the Commandant of the Marine Corps (SJA to CMC), as well as the General Counsel of the Navy, are strongly committed to ensuring that the three legal communities operate as a team to effectively and efficiently support the legal needs of the Department of the Navy. Their commitment is manifested in their publication of a joint strategic vision titled, *One Mission, One Team: A 21st Century Strategic Vision for Legal Support in the U.S. Department of the Navy*.⁶²⁹ As part of the vision statement, the three leaders agreed to the development and maintenance of three “Communities of Practice” in the areas of ethics, fiscal law, and international law as a first set of strategic initiatives.⁶³⁰ This vision is also reflected in Department of the Navy directives that call for cooperation and coordination between these legal communities. For example, the

⁶²⁸ National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111-84, § 506(B)(2)(E), 123 Stat. 2190 (2009).

⁶²⁹ *DON Strategic Legal Vision*, *supra* note 1, at 1 (signed by the General Counsel of the Navy, the Judge Advocate General of the Navy, and the Staff Judge Advocate to the Commandant of the Marine Corps).

⁶³⁰ *Id.* at 10-11 (stating that: “The JAGC and OGC already are working to improve collaboration and reachback among their attorneys by establishing Communities of Practice (COPs) in many practice areas . . . Participation in these COPs is available to those who work in any of the three DON legal communities.”).

Secretary of the Navy Instruction on roles and responsibilities expressly states that the General Counsel, the JAG, and the SJA to CMC shall maintain close working relationships on all matters of common interest.⁶³¹

For judge advocates in the Navy and Marine Corps, the foundational directive reflecting this jointly shared mission and oversight is the *Manual of the Judge Advocate General (JAGMAN)*.⁶³² The *JAGMAN* regulates the practice of both Navy and Marine judge advocates, providing common practices and procedures across both communities.⁶³³ The commonality of practice and procedures significantly enhances the abilities of Navy and Marine judge advocates to serve together in support of Navy and Marine Corps missions. For example, the fact that the form and standards for administrative investigations available to commanders and supported by judge advocates are prescribed by the *JAGMAN* allows for the effective support to a Navy commander by a Marine judge advocate or vice versa.⁶³⁴

Other directives that guide the practice of both U.S. Navy and Marine judge advocates include the instructions on: claims, legal assistance, professional conduct, judicial screening, the trial judiciary, and the court of criminal appeals.⁶³⁵

The ability of U.S. Navy and Marine judge advocates to successfully support shared missions is instilled during the Basic Lawyer Course (BLC) at Naval Justice School (NJS). NJS's mission is to train all sea Service (Navy, Marine Corps, and Coast Guard) judge

⁶³¹ SECNAVINST 5430.7Q, *supra* note 5, ¶ 7.b.(5), at 13.

⁶³² See generally *JAGMAN*, *supra* note 341.

⁶³³ The *JAGMAN* is over 400 pages long, including chapters on: Regulations Implementing and Supplementing the Manual for Courts-Martial; Administrative Investigations; Article 138 Complaints – Complaints of Wrong; Article 139 Claims – Redress of Damage to Property; Release of Government Information; Delivery of Servicemembers, Civilians, and Dependents – Service of Process and Subpoenas – State Tax and Regulatory Authority; Legal Assistance; General Claims Provisions; Authority of Armed Forces Personnel to Perform Notarial Acts; International Law; Customs Requirements – Domestic and Foreign; Admiralty Claims; Environmental Protection; and Payments Due Mentally Incompetent Members, Physical Examinations of Such Members, and Trustee Designations.

⁶³⁴ *JAGMAN*, *supra* note 341, Ch. II. Note that Chapter II of the *JAGMAN* was significantly updated by Change Transmittal 2 of September 16, 2008.

⁶³⁵ See, e.g., SECNAVINST 5400.40A, *supra* note 346; see U.S. Dep't of Navy, Judge Advocate General Instr. 5815, *Navy-Marine Corps Court of Criminal Appeals* (Sep. 3, 2010) [hereinafter *JAGINST 5815*]; see *JAGINST 5817.1D*, *supra* note 386; see U.S. Dep't of Navy, Judge Advocate General Instr. 5801.2A, *Navy-Marine Corps Legal Assistance Program* (26 Oct. 2005); see U.S. Dep't of Navy, Judge Advocate General Instr. 5890.1A, *Administrative Processing and Consideration of Claims on Behalf of and Against the United States* (18 Jun. 2005); see U.S. Dep't of Navy, Judge Advocate General Instr. 5803.1C, *Professional Conduct of Attorneys Practicing Under the Cognizance and Supervision of the Judge Advocate General* (9 Nov. 2004) [hereinafter *JAGINST 5803.1C*].

advocates.⁶³⁶ NJS is supported by both Navy and Marine Corps instructors and all U.S. Navy and Marine judge advocates attend the BLC.⁶³⁷ After attending the BLC, U.S. Navy and Marine judge advocates continue to access professional education opportunities through the Naval Justice School throughout their careers.⁶³⁸

Combined U.S. Navy and Marine judge advocate efforts are also evident in the assignment of Marine judge advocates to the Office of the Judge Advocate General.⁶³⁹ Recently, U.S. Navy judge advocates deployed with the SJA offices of Marine Expeditionary Forces,⁶⁴⁰ demonstrating the ability of U.S. Navy and Marine judge advocates to team in the deployed environment.

The zenith of Navy and Marine Corps teamwork in the legal community is the judiciary. At both trial and appellate levels, the judiciary is fully integrated with 9 Navy and 14 Marine Corps trial judges, and 6 Navy and 3 Marine Corps appellate judges working for the Chief Judge of the Navy.⁶⁴¹ Selection of all judges is subject to a common judicial screening board. In addition, the Navy-Marine Corps Appellate Review Activity is manned by 18 counsel – 9 U.S. Navy and 9 Marine judge advocates. The counsel are fully integrated, representing Navy and Marine Corps appellants without distinction, and are currently led by a Marine Corps colonel on the Appellate Government side and a Navy captain on the Appellate Defense side.⁶⁴²

⁶³⁶ U.S. Dep't of Navy, Commander, Naval Legal Service Command Instr. 5450.3B, *Mission and Functions of Naval Justice School, Newport, Rhode Island* (undated) [hereinafter COMNAVLEGSVCCOMINST 5450.3B]; CAPT Boock Presentation, *supra* note 382, at 2.

⁶³⁷ See CAPT Boock Presentation, *supra* note 382, at 5. There are 18 U.S. Navy judge advocates, 6 Marine judge advocates, 6 Navy legalmen, and 6 Marine legal service specialists assigned to Naval Justice School in Newport, Rhode Island. *Id.* The Basic lawyer Course (BLC) curriculum includes: legal assistance, administrative law, criminal law, evidence, procedure, trial advocacy, practical skills, and operational law. *Id.* at 13-17.

⁶³⁸ *Id.* at 18-20. Naval Justice School post-BLC course offerings for judge advocates include: Legal Assistance, Staff Judge Advocate, Advanced Staff Judge Advocate, Iraq-Afghanistan Pre-Deployment Legal Training, Law of Naval Operations, Law of Military Operations, Information Operations Law, Effective Courtroom Communications, Computer Crimes, Prosecuting Complex Cases, Defending Complex Cases, Basic Trial Advocacy, Intermediate Trial Advocacy, Litigating Sexual Assault Cases, Trial Advocacy Continuing Legal Education, and Senior Trial/Senior Defense Counsel Leadership. *Id.* at 19-20.

⁶³⁹ 21 Marine judge advocates and 6 Marine legal service specialists are assigned to OJAG. E-mail from Maria Catania, Office of the Judge Advocate General (Code 61), to CAPT Patrick Neher, JAGC, USN, Staff, Independent Review Panel to Study the Judge Advocate Requirements of the Department of the Navy (Dec. 2, 2010, 10:56 EST).

⁶⁴⁰ 36 U.S. Navy judge advocates deployed with the Staff Judge Advocate Offices of Deploying Marine Expeditionary Forces during 2006, 2007, 2008, and 2009.

⁶⁴¹ CAPT O'Toole Presentation, *supra* note 349, at 18-19.

⁶⁴² VADM Houck Presentation, *supra* note 4, at 24; Col Collins Presentation, *supra* note 332, at 8. Several instructions explain the process by which judges are detailed to the judiciary, and the criteria for judge advocates

The Panel concludes that the General Counsel, the JAG, and the SJA to CMC are committed to full cooperation in finding the most efficient and effective ways to provide legal services for the Department of the Navy. Appropriate common directives and guidance, bolstered by shared training through NJS, exist and are generally sufficient. The existence of common practices, procedures, and legal training enhances the ability of the two Services to consider, and efficiently implement, collaborative efforts in support of Department of Navy missions.

to hold those positions. See SECNAVINST 5400.40A, *supra* note 346; see JAGINST 5815, *supra* note 635; see JAGINST 5817.1D, *supra* note 386.

VI. Review of the Role of the Judge Advocate General of the Navy and the SJA to CMC

As part of its study, the Panel was directed to “review the role of the Judge Advocate General of the Navy, as the senior uniformed legal officer of the Department of the Navy, to determine whether additional authority for the Judge Advocate General over manpower policies and assignments of judge advocates in the Navy and Marine Corps is warranted.”⁶⁴³ During the course of that review, the Panel determined that it was appropriate to also review the role of the Staff Judge Advocate to the Commandant of the Marine Corps (SJA to CMC).

The Panel reviewed the existing statutory and regulatory authorities; received testimony and written materials from the Judge Advocate General of the Navy (JAG) and the SJA to CMC; reviewed the report of the Inspector General of the Department of Defense (DoD IG) concerning post-trial processing of courts-martial; and solicited and received from the Secretary of the Navy, the position of the Department of the Navy concerning potential regulatory and legislative changes to the roles and functions of the JAG and the SJA to CMC. Included in the DON position were the Service perspectives of the Chief of Naval Operations (CNO) and the Commandant.

A. Judge Advocate General of the Navy

As noted earlier in this report, the JAG has a role within the DON that is different than the roles of the JAGs of the Army and Air Force within their respective Military Departments and Services. To better understand the unique nature of the role of the JAG within the DON, the Panel believes it useful to first review the statutory roles of the Army and Air Force JAGs, and to then draw comparisons between their roles and the role of the JAG of the Navy.

After that comparison, in Sections VI.A.2. through 5., *infra*, the Panel will provide more detailed analysis of the role of the JAG of the Navy, at both the Departmental level and the Service level. In turn, within each of those discussions, the Panel will identify the major statutory and regulatory authorities addressing the JAG's Department- and Service-level roles.

⁶⁴³ National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111-84, § 506(b)(2)(D), 123 Stat. 2190 (2009).

More specifically, the Panel will discuss the JAG's Departmental role under statute (Section VI.A.2., *infra*); the JAG's Departmental role under regulation (Section VI.A.3., *infra*); the JAG's Service-level role under statute (Section VI.B.4, *infra*); and the JAG's Service-level role under regulation (Section VI.A.5., *infra*).

In Section VI.A.6, *infra*, the Panel will address the Department- and Service-level roles of the Deputy JAG and the Assistant JAGs, and in Section VI.A.7. and Section VI.A.8., *infra*, the Panel will address the question of whether the JAG needs additional authority over manpower policies and assignments of judge advocates in the Navy and the Marine Corps, respectively.

1. Comparison to Army and Air Force JAGs

The statutory role of the JAG in the DON differs from that of the Army and Air Force JAGs in two prominent ways: first, in the positioning of the billet within the Department; and second, in the duties assigned.

All four Services have a Military Staff within the executive part of their respective Departments (i.e., the Office of Chief of Naval Operations; Headquarters, Marine Corps; Army Staff; and Air Staff),⁶⁴⁴ and each Service Chief presides over his or her respective Military Staff – subject to the authority, direction, and control of the respective Secretary.⁶⁴⁵

The function of all four Military Staffs is to assist the Secretaries of their respective Departments in carrying out their responsibilities.⁶⁴⁶ All four Military Staffs have general duties to provide professional assistance to their respective Secretaries and Service Chiefs.⁶⁴⁷ They also have general duties to prepare their respective Services for employment, and to perform the following functions: recruiting, organizing, supplying, equipping, training, servicing, mobilizing, demobilizing, administering, and maintaining.⁶⁴⁸

⁶⁴⁴ 10 U.S.C. §§ 3031 (Army), 5031 (Navy), 5041 (Marine Corps), 8031 (Air Force) (2010).

⁶⁴⁵ *Id.* §§ 3032 and 3033 (Army), 5032 and 5033 (Navy), 5042 and 5043 (Marine Corps), and 8032 and 8033 (Air Force) (2010).

⁶⁴⁶ *Id.* §§ 3032 (Army), 5032 (Navy), 5042 (Marine Corps), 8032 (Air Force).

⁶⁴⁷ *Id.*

⁶⁴⁸ *Id.*

The Departments differ in their statutory construct in the positioning and duties of the Judge Advocates General. In the Department of the Army, the JAG is part of the Army Staff,⁶⁴⁹ and in the Department of the Air Force, the JAG is part of the Air Staff.⁶⁵⁰ The Army and Air Force JAGs, as members of their respective Service Staffs, are responsible to and report directly to their respective Service Chiefs.⁶⁵¹ By statute, they are also legal advisers to their respective Service Secretaries and to all the officers and agencies of their respective Departments.⁶⁵² And both the Army and Air Force JAGs, by statute, provide independent legal advice to their respective Secretaries and Service Chiefs.⁶⁵³

The Army JAG, by statute: “shall direct the members of the Judge Advocate General's Corps in the performance of their duties,”⁶⁵⁴ and the Air Force JAG, by statute, “shall direct the officers of the Air Force designated as judge advocates in the performance of their duties.”⁶⁵⁵ They also make all judge advocate assignments for their respective Services, exercising the authority of a “Judge Advocate General” under Articles 1 and 6 of the Uniform Code of Military Justice (UCMJ).⁶⁵⁶

Unlike the Army JAG or the Air Force JAG, by statute the JAG of the Navy is a part of the Office of the Secretary.⁶⁵⁷ The JAG of the Navy performs duties and functions specifically

⁶⁴⁹ *Id.* § 3031(b).

⁶⁵⁰ *Id.* § 8031(b).

⁶⁵¹ *Id.* §§ 3033(d), 8033(d).

⁶⁵² *Id.* §§ 3037(c)(1), 8037(c)(1) (2010).

⁶⁵³ *Id.* §§ 3037(e)(1), 8037(f)(1).

⁶⁵⁴ *Id.* § 3037(c)(2). In the Army, the JAG Corps is a special branch of the Service, as that phrase is defined under 10 U.S.C. §§ 3064-3065 (2010).

⁶⁵⁵ *Id.* § 8037(c)(2). The Air Force JAG is the official that designates qualified officers in the Air Force to perform functions as judge advocates, as provided in statute. 10 U.S.C. § 8067(g) (2010); U.S. Air Force Instruction (AFI) 51-102, *The Judge Advocate General's Department Air Force Instructions*, ¶ 2.4., at 1-2 (19 Jul. 1994); U.S. Air Force Instruction (AFI) 51-103, *Designation and Certification of Judge Advocates*, ¶ 1., at 1-2 (7 Dec. 2004).

⁶⁵⁶ *Id.* §§ 801-806.

⁶⁵⁷ In 1986, Senator Denton offered an explanation of the Department-level placement of the JAG in the DON, as part of a larger discussion of governance of two Services within a single Department. U.S. Senate, Committee on Armed Servs., *Department of Defense Reorganization Act of 1986 to Accompany S. 2295* (S. Rep. No. 99-280, at 169), Washington: Government Printing Office, 1986. Senator Denton expressed concern during the conference committee's consideration of the Department of Defense Re-organization Act of 1986 that using the Department of the Army's statutory construct as a model for the Department of the Navy would produce anomalous results. He stated,

[T]he attempt to provide uniformity fails to accommodate the diversity among the Departments and the military services. For example, the Department of the Navy includes two services . . .

“under the direction of the Secretary,” to include even those duties assigned under the Uniform Code of Military Justice.⁶⁵⁸ The JAG is not part of Headquarters, Marine Corps,⁶⁵⁹ and is only part of the Office of the Chief of Naval Operations by regulation, not statute.⁶⁶⁰ Also, unlike the Army JAG or the Air Force JAG, the JAG of the Navy lacks statutory authority to “direct” judge advocates in their performance of duties.⁶⁶¹ The JAG is the Chief of the U.S. Navy JAG Corps only by regulation,⁶⁶² and while the JAG makes all judge advocate assignments in the U.S. Navy by statute, under that same statute, the Commandant makes all assignments of Marine judge

Functions that may, in the other Departments, fall properly under the Chief of Staff must, in the Navy, fall under the Service Secretary. That is, for example, the case with the Judge Advocate General . . .

Id.

In addition, the JAG explained to the Panel that,

The [JAG] . . . has both statutory and regulatory assignments at the Departmental level that transcend both Services and operate across the Department of the Navy as well as . . . Service responsibilities . . . for example, . . . the JAG’s authority under Article 6 UCMJ to make inspections of military justice process in the field and to provide advice to the Secretary on matters of military justice . . . where the JAG would have a Departmental role as well as a Service role in terms of executing military justice functions.

VADM Houck Testimony, *supra* note 107, at 23-25.

⁶⁵⁸ 10 U.S.C. § 5148(d). The Uniform Code of Military Justice (UCMJ) (Chapter 47, title 10) establishes independent statutory authority for each JAG to exercise certain military justice functions. The JAG of the Navy establishment statute provides that the JAG shall perform these UCMJ functions “under the direction of the Secretary.” *Compare* 10 U.S.C. § 5148(d) (“The Judge Advocate General of the Navy, under the direction of the Secretary of the Navy, shall . . . perform the functions and duties and exercise the powers prescribed for the Judge Advocate General in chapter 47 of [title 10]), *with* §§ 3037 (Army), 8037 (Air Force) (not requiring the JAG to perform UCMJ functions under direction of the Secretary concerned).

⁶⁵⁹ The SJA to CMC is part of Headquarters, Marine Corps.

⁶⁶⁰ *See* SECNAVINST 5430.27C, *supra* note 15, ¶ 5., at 4; OPNAVNOTE 5430, *supra* note 24, enclosure (1). Under Secretarial instruction and CNO instruction, the JAG is the Special Assistant for Legal Services to the CNO. SECNAVINST 5430.27C, *supra* note 15, ¶ 5., at 4; OPNAVNOTE 5430, *supra* note 24, enclosure (1). In fact, the U.S. Navy is the only Service without a senior legal adviser designated by statute to serve within the Service Staff.

⁶⁶¹ *Compare* 10 U.S.C. § 5148(d) (Navy) (not providing the JAG of the Navy with the authority to direct judge advocates in the performance of their duties), *with* §§ 3037(c) (Army), 8037(c) (Air Force) (the JAG shall direct judge advocates in the performance of their duties). The JAG of the Navy supervises the provision of legal services by operation of Secretarial instructions. All of these instructions include defined roles for the JAG, but this does not mean that the JAG provides all legal advice in all of these areas. The JAG also exercises supervision and oversight of judge advocates in the U.S. Navy by operation of instruction from the CNO. *See* OPNAVNOTE 5430, *supra* note 24, enclosure (1).

⁶⁶² Article 0103 of Navy Regulations provides that: “United States Navy Regulations is the principal regulatory document of the Department of the Navy, endowed with the sanction of law, as to duty, responsibility, authority, distinctions and relationships of various commands, officials, and individuals.” NAVREGS, *supra* note 17, art. 0103.

advocates.⁶⁶³ By statute, the JAG provides independent legal advice to the Secretary of the Navy and to the CNO, but not to the Commandant.⁶⁶⁴ By statute, the SJA to CMC provides independent legal advice to the Commandant, but not to the Secretary.⁶⁶⁵

2. JAG's Departmental Role under Statute

At the outset, the Panel notes that in describing the JAG's Departmental role, there is not always a clear demarcation between Departmental and Service functions. While recognizing the difference is more than just academic, the Panel believes for purposes of this study, it is unnecessary to make such definitive distinctions in every case. Rather, the Panel will refer to a function broadly and generally as "Departmental" if it is either inherently Departmental in nature (e.g., serve as Staff Assistant to the Secretary) or if it is assigned to the JAG for Department-wide application, regardless of whether it could be assigned or performed at the Service level (e.g., conducting inspections in the field in the supervision of the administration of military justice). The Panel will refer to a function as Service level when it is either assigned at the Service level (e.g., designating the JAG as the Special Assistant for Legal Services to the CNO), or when it is performed in every significant aspect at the Service level (e.g., the assignment of judge advocates).⁶⁶⁶

Chapter 513 of title 10 of the United States Code provides that there is, in the executive part of the Department of the Navy, a JAG who shall be appointed from judge advocates of the Navy *or* the Marine Corps.⁶⁶⁷ There is also within the executive part, a Deputy JAG who shall

⁶⁶³ 10 U.S.C. § 806(a) (under the UCMJ, assignments of Marine judge advocates are made by direction of the Commandant of the Marine Corps, while Navy, Army, and Air Force judge advocate assignments are made upon recommendation of the JAG of the applicable Service).

⁶⁶⁴ *Id.* § 5148(e).

⁶⁶⁵ *See id.* § 5046(c).

⁶⁶⁶ The Panel notes that while it is difficult to clearly delineate between the JAG's Departmental functions and Service-level functions, it appears to the Panel that the JAG does not, today, directly perform functions at the Service-level within the U.S. Marine Corps. Also on this point, the Panel notes that the Commandant of the Marine Corps has not assigned Service-level functions to the JAG.

⁶⁶⁷ 10 U.S.C. § 5148(b) (stating that "The Judge Advocate General shall be appointed by the President, by and with the advice and consent of the Senate, for a term of four years. He shall be appointed from judge advocates of the Navy or the Marine Corps who are members of the bar of a Federal court or the highest court of a State and who have had at least eight years of experience in legal duties as commissioned officers. The Judge Advocate General, while so serving, has the grade of vice admiral or lieutenant general, as appropriate.").

be appointed from judge advocates of the Navy *and* the Marine Corps,⁶⁶⁸ and Assistant JAGs, one of whom may be detailed from judge advocates of the Navy⁶⁶⁹ and one of whom may be detailed from judge advocates of the Marine Corps,⁶⁷⁰ and an Office of the Judge Advocate General (OJAG).⁶⁷¹ The Deputy JAG and Assistant JAGs are discussed separately in Section VI.A.6., *infra*.

By statute, the JAG, while so serving, has the grade of vice admiral or lieutenant general (three stars).⁶⁷² Also by statute, under regulations prescribed by the Secretary of Defense, the Secretary of the Navy, in selecting an officer for recommendation to the President for appointment as the JAG, shall ensure that the officer selected is recommended by a board of officers that, insofar as practicable, is subject to the procedures applicable to selection boards convened under chapter 36 of title 10.⁶⁷³

⁶⁶⁸ *Id.* § 5149(a)(1) (2010) (stating that “There is a Deputy Judge Advocate General of the Navy who is appointed by the President, by and with the advice and consent of the Senate, from among judge advocates of the Navy and Marine Corps who have the qualifications prescribed for the Judge Advocate General.”).

⁶⁶⁹ *Id.* § 5149(b) (stating that “An officer of the Judge Advocate General's Corps who has the qualifications prescribed for the Judge Advocate General in section 5148(b) of this title . . . may be detailed as Assistant Judge Advocate General of the Navy.”).

⁶⁷⁰ *Id.* § 5149(c) (stating that “A judge advocate of the Marine Corps who has the qualifications prescribed for the Judge Advocate General in section 5148(b) of this title . . . may be detailed as Assistant Judge Advocate General of the Navy.”).

⁶⁷¹ *Id.* § 5148(b) (stating that “There is in the executive part of the Department of the Navy the Office of the Judge Advocate General of the Navy.”).

⁶⁷² *Id.* § 5148.

⁶⁷³ *Id.* § 5148(b). The Secretary of the Navy instruction governing the selection of an officer for recommendation for appointment as the JAG provides in pertinent part that if the Secretary elects to use board procedures, U.S. Dep’t of Navy, Sec’y of Navy Instr. 1401.3A, *Selection Board Membership*, ¶ 12., at 11 (Dec. 20, 2005), then the board shall be composed of five officers from the active-duty lists of the Navy and the Marine Corps, all serving in grades higher than that of the officers under consideration. *Id.* enclosure (3). Three of the officers must be unrestricted line officers in the U.S. Navy, one from each major warfare specialty. *Id.* One or more members may be Marine Corps officers and one or more members shall be officers of the Navy JAG Corps. *Id.* The Panel notes that the reference to one “or more” Marine Corps officers appears, on its face, to be irreconcilable with the requirements that the board be composed of only five members, three of whom must be Navy unrestricted line officers and one of whom must be a Navy JAG Corps officer.

As the JAG testified to the Panel, under the existing Secretarial policy, “The board to select the judge advocate general has been a one of one board” in which only the Deputy JAG is considered for selection. VADM Houck Testimony, *supra* note 107, at 418. For historical purposes, the first “JAG” is considered to have been a Marine Corps officer, Colonel William Butler Remey, who served from 1880-1892. See MajGen Ary Testimony, *supra* note 242, at 419. No Marine Corps officer has served in that position since that time, and since the establishment of the Navy JAG Corps in 1967, there has been only one instance in which Marine judge advocates were considered by a JAG selection board. VADM Houck Testimony, *supra* note 107, at 418-19; see also Letter from MajGen Vaughn A. Ary, USMC, Staff Judge Advocate to the Commandant, to Mr. Daniel J. Dell’Orto, Chairman, Independent Review Panel to Study the Judge Advocate Requirements of the Department of the Navy,

The JAG's primary statutory Departmental responsibilities and authorities are established in chapters 47, 53, 503, and 513 of title 10. As noted earlier, under chapter 503, section 5014 of title 10, the JAG is part of the Office of the Secretary of the Navy. The principal function of the Office is to assist the Secretary of the Navy in carrying out his responsibilities.⁶⁷⁴

Chapter 513, section 5148 of title 10 provides that the JAG shall, under the direction of the Secretary:

- perform duties relating to legal matters arising in the DON as may be assigned to him, and perform such other duties as may be assigned to him;
- perform the functions and duties of, and exercise the powers prescribed for, a Judge Advocate General in chapter 47 of title 10; and
- receive, revise, and have recorded the proceedings of boards for the examination of officers of the naval service for promotion and retirement.⁶⁷⁵

Subj: Follow up Comment on Proposed Authorities, enclosure (1), at 1 (27 Sep. 2010) [hereinafter MajGen Ary Authorities Letter]; Letter from General (Gen) James F. Amos, USMC, Commandant of the Marine Corps, to Mr. Daniel J. Dell'Orto, Chairman, Independent Review Panel to Study the Judge Advocate Requirements of the Department of the Navy (Oct. 29, 2010) [hereinafter Gen Amos Letter of Oct. 29, 2010].

The reference to using selection board procedures [to select a JAG] must be understood in the context of the Defense Officer Personnel Management Act (DOPMA) as it is implemented in chapter 36 of title 10. Under DOPMA, military officers are not considered by selection boards for promotion to general or admiral (O-10) or lieutenant general or vice admiral (O-9). Rather, officers are temporarily appointed to positions of importance and responsibility under 10 U.S.C. § 601, and, while serving, hold the temporary grades of general, admiral, lieutenant general, or vice admiral. Such officers typically have permanent grades at the two-star level (O-8) as a result of previous selection board action under DOPMA. Stated differently, under DOPMA, officers are considered by selection boards for promotion only through grades of major general or rear admiral (O-8). Thereafter, they may be temporarily appointed, without selection board action, to "601 positions" of importance and responsibility, and serve in grades O-9 or O-10. While serving in "601 positions" they continue to hold their permanent grades, which typically are at the two-star level (O-8).

In the case of the DON JAG, there are additional permutations. By statute, the JAG holds the grade of O-9 "while so serving." 10 U.S.C. § 5148. If a U.S. Navy or Marine judge advocate is appointed to serve as the JAG after serving previously as the Deputy JAG, then he or she would hold a permanent grade of O-8 from that prior service as the Deputy JAG. See 10 U.S.C. § 5149. However, if an officer is appointed as the JAG immediately after serving as the SJA to CMC, the JAG would most likely have the permanent grade of colonel. This is because the SJA to CMC statute provides that the SJA to CMC holds the grade of major general "while so serving." *Id.* § 5046. As will be discussed in Section VI.B.1(a), *infra*, the Panel believes that the SJA to CMC should serve in a permanent grade of major general. This recommendation stands on its own, without regard to whether the SJA to CMC should be considered for appointment as the JAG.

⁶⁷⁴ *Id.* § 5014(a).

⁶⁷⁵ *Id.* § 5148(d).

Section 5148 also provides that the JAG is responsible for providing independent legal advice and opinions to the Secretary of the Navy (SECNAV).⁶⁷⁶

Chapter 47 of title 10 addresses the role of the JAG under the UCMJ,⁶⁷⁷ and provides, in part, that the JAG or senior members of his staff shall make frequent inspections in the field in supervision of the administration of military justice, and that the assignment for duty of judge advocates in the U.S. Navy shall be made upon recommendation by the JAG.⁶⁷⁸ The JAG is also responsible for certifying military judges as “qualified for duty,” (Article 26),⁶⁷⁹ certifying trial and defense counsel as “competent to perform such duties,” (Article 27),⁶⁸⁰ establishing a court of criminal appeals (Article 66),⁶⁸¹ ordering cases for review by that court or the Court of Appeals for the Armed Forces (Articles 67 and 69),⁶⁸² and modifying or setting aside the findings or sentence in individual cases (Article 69).⁶⁸³

Chapter 53, section 1044 of title 10, U.S. Code, addresses the role of the JAG in the establishment and supervision of legal assistance programs.⁶⁸⁴ It provides, in pertinent part: “Under such regulations as may be prescribed by the Secretary concerned, the Judge Advocate General (as defined in section 801(1) of this title), under the jurisdiction of the Secretary is responsible for the establishment and supervision of legal assistance programs under this section.”⁶⁸⁵

⁶⁷⁶ *Id.* § 5148(e) (stating that “No officer or employee of the Department of Defense may interfere with - (1) the ability of the Judge Advocate General to give independent legal advice to the Secretary of the Navy or the Chief of Naval Operations; or (2) the ability of judge advocates of the Navy assigned or attached to, or performing duty with, military units to give independent legal advice to commanders.”). The provision of independent legal advice to the CNO is considered a Service-level function and is discussed further in Section VI.A.5., *infra*.

⁶⁷⁷ *Id.* §§ 801, 806. Under Article 1 of the UCMJ: “The term ‘Judge Advocate General’ means, severally, the Judge Advocates General of the Army, Navy, and Air Force and, except when the Coast Guard is operating as a service in the Navy, an official designated to serve as Judge Advocate General of the Coast Guard by the Secretary of Homeland Security.” *Id.* § 801(1). Article 1 also provides that “The Navy, the Marine Corps, and the Coast Guard when it is operating as a service in the Navy, shall be considered as one armed force.” *Id.* § 801(2). That definition applies only within the context of chapter 47 of title 10. This means that the SJA to CMC is not a “JAG” for purposes of the UCMJ and has no original statutory authority to perform any of the functions assigned to the JAG.

⁶⁷⁸ *Id.* § 806(a).

⁶⁷⁹ *Id.* § 826(b).

⁶⁸⁰ *Id.* § 827(b).

⁶⁸¹ *Id.* § 866(a).

⁶⁸² *Id.* §§ 867(a), 869(a).

⁶⁸³ *Id.* § 869(b).

⁶⁸⁴ *Id.* § 1044 (2010).

⁶⁸⁵ *Id.* § 1044(b).

3. JAG's Departmental Role under Regulation

The Secretary of the Navy has prescribed Departmental responsibilities for the JAG, exercising his (the Secretary's) original authority under section 6011 of title 10,⁶⁸⁶ as well as his authorities as provided for in chapters 47, 53, 503, and 513 of title 10. Specifically, the JAG reports directly to the Secretary⁶⁸⁷ and serves as a Staff Assistant to the Secretary.⁶⁸⁸ As a Staff Assistant, the JAG “provides or supervises the provision of all legal advice and related services throughout the Department of the Navy, except for the advice and services provided by the General Counsel,”⁶⁸⁹ and he “provides legal and policy advice to [SECNAV] on military justice, administrative law, claims, operational and international law, and litigation involving these issues.”⁶⁹⁰

SECNAV has also assigned JAG responsibilities for providing and supervising the provision of legal advice and related services throughout the Department of the Navy in the following areas: military justice; operational and international law; administrative law; legal assistance; and civil law; and, jointly with the General Counsel, in the areas of Freedom of Information Act (FOIA) and Privacy Act; intelligence oversight; and litigation.⁶⁹¹ Together with

⁶⁸⁶ *Id.* § 6011 (stating that the Secretary of the Navy shall issue United States Navy Regulations (NAVREGS)); *see also* NAVREGS, *supra* note 17, art. 0102.

⁶⁸⁷ SECNAVINST 5430.27C, *supra* note 15, ¶ 7., at 4.

⁶⁸⁸ NAVREGS, *supra* note 17, art. 0310; SECNAVINST 5430.7Q, *supra* note 5, ¶ 3.a.(2)(e), at 2, ¶ 7.c.(5), at 18; SECNAVINST 5430.27C, *supra* note 15, ¶ 4., at 2.

⁶⁸⁹ NAVREGS, *supra* note 17, art. 0331, ¶ 1.(a). NAVREGS do not amplify what is meant by “supervises the provision of” legal advice and services; *see also* SECNAVINST 5430.27C, *supra* note 15, ¶ 4., at 2 (stating that “the JAG is responsible for providing and supervising the provision of legal advice and related services throughout the Department of the Navy. . .”).

⁶⁹⁰ NAVREGS, *supra* note 17, art. 0331, ¶ 1.(c); *see* SECNAVINST 5430.7Q, *supra* note 5, ¶ 7.c.(5)(b), at 18; *see* SECNAVINST 5430.27C, *supra* note 15, ¶ 7., at 4-5.

⁶⁹¹ SECNAVINST 5430.27C, *supra* note 15, ¶ 4., at 2-4. NAVREGS article 0331 and SECNAVINST 5430.27C both refer to the responsibility of the JAG to *supervise the provision* of legal services and advice. NAVREGS, *supra* note 17, art. 0331, ¶ 1.(a); SECNAVINST 5430.27C, *supra* note 15, ¶ 4., at 2. Although not amplified in NAVREGS, in SECNAVINST 5430.27C “Supervision of Legal Services,” includes ensuring the ethical and professional practice of law (i.e., professional responsibility); certifying trial and defense counsel and military judges; commanding OJAG; and at the Navy Service-level, serving as the Chief of the JAG Corps. SECNAVINST 5430.27C, *supra* note 15, ¶ 3.a., at 1. Supervision of legal services may also include the implementation, execution, management, and oversight of the military criminal justice system at the trial and appellate levels, and inspecting Naval Legal Service Command offices, but this is less clear. *See id.* ¶ 4.a., at 2. Although the meaning of “supervising the provision of legal advice and related services” is subject to interpretation, it is clear that the concept does not allow the JAG to exercise plenary authority over judge advocates of the Navy and the Marine Corps, or to exercise direct supervision of U.S. Navy or Marine judge advocates outside OJAG. *See id.* ¶ 7., at 4-5; *see also* Section VI.A.7., *infra*, discussing decentralized command and control in the naval Services.

the General Counsel, the JAG provides legal advice on government ethics, standards of conduct, environmental law, and civilian personnel law.⁶⁹²

SECNAV has also assigned the JAG the primary responsibility for ensuring the ethical and professional practice of law by judge advocates and other covered U.S. Government (USG) and non-USG attorneys practicing under the cognizance of the JAG.⁶⁹³

In addition, SECNAV has also issued numerous instructions addressing Department-wide policies in specific functional areas, which include legal requirements and associated responsibilities for the JAG.⁶⁹⁴ The JAG has responsibilities for, *inter alia*, the following: the Navy-Marine Corps Trial Judiciary; the Victim and Witness Assistance Program (VWAP); the clemency and parole systems; the law of war program; legal reviews of weapons systems; compliance with arms control agreements; international agreements; status of forces policies; consular protection of foreign nationals subject to the UCMJ; oversight of intelligence activities; special access programs, covert action activities, and sensitive activities; tax law matters; the Department's Privacy Act Program and FOIA Program; equal opportunity; publications in the Federal Register; and various environmental law regulations.⁶⁹⁵

In the Department of the Navy, "professional supervision" of judge advocates is akin to the function a state bar performs in establishing rules of professional responsibility and enforcing those rules through censure and debarment. In SECNAVINST 5430.27C, this concept is referred to as "ensuring the ethical and professional practice of law." SECNAVINST 5430.27C, *supra* note 15, ¶ 3.a., at 1.

A separate but related concept – "certification" of counsel under Article 27(b) of the UCMJ – is concerned with ensuring counsel are trained and licensed to practice law, and have successfully completed the prescribed training and education requirements to practice in military courts (e.g., completion of the Basic Lawyer Course at Naval Justice School).

⁶⁹² *Id.* ¶ 7., at 5. The Panel notes that since a principal purpose of this study is to examine authorities of the JAG, we have made little attempt to discuss authorities of the General Counsel. In some cases, authorities are clearly jointly performed by the General Counsel and the JAG, e.g., environmental law and ethics; in others cases, one or the other plays the predominant role, even though both have been assigned the same general responsibility.

⁶⁹³ *Id.* ¶ 3.a., at 1-2. The JAG's responsibility extends to active-duty and reserve judge advocates in the Navy and Marine Corps. *Id.* It also extends to the following attorneys when they practice under the cognizance of the JAG: uniformed attorneys from other Services, civilian U.S. Government (USG) attorneys, and non-USG attorneys. *Id.* The JAG has issued rules and procedures on professional responsibility through JAGINST 5803.1C of Nov. 2004. JAGINST 5803.1C, *supra* note 635.

⁶⁹⁴ All of the following instructions, *infra* note 695, issued by SECNAV include defined roles for the JAG, but this does not mean that the JAG provides all legal advice in all of the described areas.

⁶⁹⁵ See U.S. Dep't of Navy, Sec'y of Navy Instr. 3300.1C, *Department of the Navy Law of War Program* (28 May 2009); see U.S. Dep't of Navy, Sec'y of Navy Instr. 5840.8A, *Tax Law Matters Affecting Department of the Navy Military Personnel* (9 Apr. 2009); see U.S. Dep't of Navy, Sec'y of Navy Instr. 5720.45C, *Publication of Department of the Navy Directives and Other Documents in the Federal Register* (25 Mar. 2009); see U.S. Dep't of Navy, Sec'y of

The Secretary of the Navy also approves the *Manual of the Judge Advocate General (JAGMAN)*, which is a Department-wide regulation, applicable to the Navy and Marine Corps, that implements the Uniform Code of Military Justice and sets standards for administrative investigations, legal assistance, the release of government information, certain international and environmental legal matters, admiralty law matters, and matters relating to the investigation and payment of claims and compliance with customs laws.⁶⁹⁶

Pursuant to Navy Regulations and Secretarial instructions, the JAG commands OJAG.⁶⁹⁷ The JAG sets the organization, missions, and functions of OJAG.⁶⁹⁸ OJAG supports the JAG in his execution of Departmental responsibilities.⁶⁹⁹

The JAG oversees, in conjunction with senior Navy and Marine judge advocates, the process whereby Department-wide standards are set for the training of judge advocates (and

Navy Instr. 5000.34D, *Oversight and Management of Intelligence Activities, Intelligence-Related Activities, Special Access Programs, Covert Action Activities, and Sensitive Activities within the Department of the Navy* (3 Dec. 2008); see U.S. Dep't of Navy, Sec'y of Navy Instr. 5000.2D, *Implementation and Operation of the Defense Acquisition System and the Joint Capabilities Integration and Development System* (Oct. 16, 2008); see U.S. Dep't of Navy, Sec'y of Navy Instr. 5350.16A, *Equal Opportunity (EO) Within the Department of the Navy (DON)* (18 Dec. 2006); see U.S. Dep't of Navy, Sec'y of Navy Instr. 5090.8A, *Policy for Environmental Protection, Natural Resources, and Cultural Resources Programs* (Jan. 30, 2006); see U.S. Dep't of Navy, Sec'y of Navy Instr. 5090.7A, *Access to Ships and Shore Facilities, and Release of Information Regarding Navy Oil Spills* (Jan. 26, 2006); see U.S. Dep't of Navy, Sec'y of Navy Instr. 5800.11B, *Victim and Witness Assistance Program* (Jan. 5, 2006); see U.S. Dep't of Navy, Sec'y of Navy Instr. 5211.5E, *Department of the Navy (DON) Privacy Program* (28 Dec. 2005); see SECNAVINST 5400.40A, *supra* note 346; see U.S. Dep't of Navy, Sec'y of Navy Instr. 1752.4A, *Sexual Assault Prevention and Response* (1 Dec. 2005); U.S. Dep't of Navy, Sec'y of Navy Instr. 1752.3B, *Family Advocacy Program (FAP)* (10 Nov. 2005); see U.S. Dep't of Navy, Sec'y of Navy Instr. 3820.3E, *Oversight of Intelligence Activities within the Department of the Navy (DON)* (21 Sep. 2005); see U.S. Dep't of Navy, Sec'y of Navy Instr. 5090.6A, *Environmental Planning for Department of the Navy Actions* (Apr. 26, 2004); see U.S. Dep't of Navy, Sec'y of Navy Instr. 5815.3J, *Department of the Navy Clemency and Parole Systems* (Jun. 12, 2003); see U.S. Dep't of Navy, Sec'y of Navy Instr. 5710.23C, *Implementation of, and Compliance with, Arms Control Agreements* (21 Sep. 2002); see U.S. Dep't of Navy, Sec'y of Navy Instr. 5720.42F, *Department of the Navy Freedom of Information Act (FOIA) Program*, (6 Jan. 1999); see U.S. Dep't of Navy, Sec'y of Navy Instr. 5710.25B, *International Agreements* (23 Dec. 2005); see U.S. Dep't of Navy, Sec'y of Navy Instr. 5820.4G, *Status of Forces Policies, Procedures, and Information* (14 Jan. 1990); see U.S. Dep't of Navy, Sec'y of Navy Instr. 5820.6, *Consular Protection of Foreign Nationals Subject to the Uniform Code of Military Justice* (5 Nov. 1968).

⁶⁹⁶ See generally *JAGMAN*, *supra* note 341.

⁶⁹⁷ NAVREGS, *supra* note 17, art. 0331; SECNAVINST 5430.7Q, *supra* note 5, ¶ 7.c.(5), at 18; SECNAVINST 5430.27C, *supra* note 15, ¶ 3., at 1.

⁶⁹⁸ See JAGINST 5400.1A, *supra* note 351, ¶¶ 101.-102.a., at 1-1.

⁶⁹⁹ OJAG also supports the JAG in his execution of Navy Service-level responsibilities: "As a staff office within Navy Secretariat, the Office of the Judge Advocate General's Corps [sic] (OJAG's) primary mission is to support the Judge Advocate General (JAG) in providing legal and policy advice to the Secretary of the Navy. In addition, OJAG supports JAG in advising and assisting the Chief of Naval Operations in formulating and implementing policies and initiatives pertaining to the provision of legal services within the Navy." <http://www.jag.navy.mil/organization.htm>.

other legal professionals) at the Naval Justice School, including the training of trial and appellate judges.⁷⁰⁰ Navy and Marine judge advocates achieve their certifications to perform duties as trial or defense counsel, or to perform legal assistance services, upon successful completion of the Basic Lawyer Course at Naval Justice School.⁷⁰¹

4. JAG's U.S. Navy Service Role Under Statute

Although the JAG's U.S. Navy Service-level functions are established primarily by regulations and instructions issued by SECNAV or the CNO, two functions are established directly by statute. Under section 806 of title 10, the assignment for duty of U.S. Navy judge advocates shall be made upon the recommendation of the JAG; under section 5148(e) of title 10, the JAG provides independent legal advice to the CNO.⁷⁰²

5. JAG's U.S. Navy Service Role Under Regulation

Under Navy Regulations and Secretarial instruction, the JAG is the Chief of the U.S. Navy JAG Corps.⁷⁰³ As the head of the JAG Corps, the JAG is the principal advisor and sponsor on matters concerned with officers in the JAG Corps and enlisted personnel in the legalman rating, and serves as the spokesperson for professional matters within the military and civilian communities.⁷⁰⁴

Under Secretarial instruction and CNO instruction, the JAG is the Special Assistant for Legal Services to the CNO.⁷⁰⁵ As the Special Assistant for Legal Services, the JAG is responsible for advising and assisting the CNO in formulating and implementing policies and

⁷⁰⁰ The Mission of the Naval Justice School (NJS) is to: "Train all Sea Service (Navy, Marine Corps and Coast Guard) judge advocates, and enlisted and civilian legal professionals to deliver quality legal services, promote justice, and enhance Sea Service fleet readiness." <http://www.jag.navy.mil/njs.htm>; see also COMNAVLEGSVCCOMINST 5450.3B, *supra* note 636, ¶ 3.a., at 1. NJS is overseen by a board of advisors, which approves the curricula for each academic year. CAPT Boock Testimony, *supra* note 381, at 171. Although NJS is primarily funded by the U.S. Navy, and is carried within the U.S. Navy command echelon, its faculty is composed of U.S. Navy and Marine judge advocates and enlisted personnel, and the Marine Corps provides some funding. *Id.* at 151, 175-76; see also VADM Houck Memorandum (Ser 00/0098), *supra* note 172, ¶ 4.c., at 5-6; CAPT Boock Presentation, *supra* note 382, at 4-5.

⁷⁰¹ See CAPT Boock Testimony, *supra* note 381, at 153-54.

⁷⁰² 10 U.S.C. § 5148(e). The JAG also, by statute, provides independent legal advice to the Secretary, but not to the Commandant.

⁷⁰³ NAVREGS, *supra* note 17, art. 0331; SECNAVINST 5430.7Q, *supra* note 5, ¶ 7.c.(5), at 18; SECNAVINST 5430.27C, *supra* note 15, ¶ 3., at 1.

⁷⁰⁴ NAVREGS, *supra* note 17, art. 1009.

⁷⁰⁵ SECNAVINST 5430.27C, *supra* note 15, ¶ 5., at 4; OPNAVNOTE 5430, *supra* note 24, enclosure (1).

initiatives pertaining to the provision of legal services within the U.S. Navy.⁷⁰⁶ The CNO, in turn, has assigned 15 specific Service-level functions to the JAG, and assigned him a general responsibility to act on matters as directed. Included within the 15 specific Service-level functions, the JAG:

- oversees and supervises the provision of legal services by Naval Legal Service Command, the OJAG, and Navy SJA Offices⁷⁰⁷ in support of CNO operating forces and shore activity commanders;
- administers and supervises the Navy's legal assistance program;
- advises the CNO on military personnel law matters;
- supervises U.S. Navy judge advocates serving as ethics counselors;
- administers and supervises the investigation and adjudication of claims;
- conducts legal reviews of weapons and weapons systems;
- advises CNO and shore activity commanders on international agreements;
- acts as the point of contact for CNO operating forces and shore activity commanders to ensure consistency of legal compliance, guidance, policies, procedures, objectives, training, and support;
- serves as liaison for CNO with DoD components, governmental agencies, and agencies outside the government on legal services matters affecting the Navy; and
- represents CNO in the interagency process and at international organizations (e.g., the International Maritime Organization), regarding international and operational law issues.⁷⁰⁸

⁷⁰⁶ See discussion *supra* in note 666 for a discussion of the blurring between the JAG's Departmental functions and Service-level functions.

⁷⁰⁷ As noted earlier, unlike the Army JAG, the Navy JAG does not "direct the members of the Judge Advocate General's Corps in the performance of their duties." See 10 U.S.C. § 3037(c); see also 10 U.S.C. § 8037 (providing that the Air Force JAG "shall direct the officers of the Air Force designated as judge advocates in the performance of their duties"). In contrast to the Army and Air Force JAGs, the Navy JAG, through CNO Instruction, oversees and supervises the provision of legal services by U.S. Navy judge advocates. See OPNAVNOTE 5430, *supra* note 24, enclosure (1).

⁷⁰⁸ OPNAVNOTE 5430, *supra* note 24, enclosure (1).

Under both Secretarial instruction and CNO instruction, the JAG has responsibilities as a “capability sponsor” within the U.S. Navy.⁷⁰⁹ The Secretarial instruction provides: “As the capability sponsor for the Navy legal community, the JAG is responsible for building a coherent legal community and determining the best possible allocation of personnel assets.”⁷¹⁰ The CNO instruction provides: “As the JAG Corps capability sponsor, [the JAG is] responsible for building a coherent legal community, monitoring staffing levels and workload trends, and advising CNO concerning the appropriate distribution of assets to ensure the effective and efficient provision of legal services.”⁷¹¹

As discussed in Section VI.A.7., *infra*, while the JAG has been assigned responsibility by the Secretary and the CNO to build a coherent legal community in the U.S. Navy, he has not been assigned commensurate authorities to execute that responsibility.

6. Deputy JAG and Assistant JAGs – Departmental and Service Roles

Under chapter 513 of title 10, within the executive part of the Department, there is an Office of the Judge Advocate General (OJAG) that includes within it a Deputy JAG and Assistant JAGs (AJAGs).⁷¹² The Deputy JAG shall be appointed from among judge advocates of the Navy and the Marine Corps who have the qualifications prescribed for the JAG.⁷¹³ The Deputy JAG is appointed in the permanent grade of rear admiral or major general.⁷¹⁴

By statute – as with the JAG – under regulations prescribed by the Secretary of Defense, the Secretary of the Navy (SECNAV), in selecting an officer for recommendation to the President for appointment as the Deputy JAG, shall ensure that the officer selected is

⁷⁰⁹ SECNAVINST 5430.27C, *supra* note 15, ¶ 3., at 1; OPNAVNOTE 5430, *supra* note 24, enclosure (1), ¶ 14.

⁷¹⁰ SECNAVINST 5430.27C, *supra* note 15, ¶ 3., at 1.

⁷¹¹ OPNAVNOTE 5430, *supra* note 24, enclosure (1), ¶ 14.

⁷¹² 10 U.S.C. § 5149.

⁷¹³ *Id.* The qualifications to be the JAG are: be a member of the bar of a Federal court or the highest court of a State and have at least eight years of experience in legal duties as a commissioned officer.

⁷¹⁴ *Id.* § 5149(a)(1).

recommended by a board of officers that, insofar as practicable, is subject to the procedures applicable to selection boards convened under chapter 36 of title 10.⁷¹⁵

By statute, an officer of the Navy JAG Corps who has the qualifications prescribed for the JAG may be detailed to serve as Assistant JAG, and a judge advocate of the Marine Corps who has the qualifications prescribed for the JAG may be detailed as Assistant JAG.⁷¹⁶ That construct reflects an original Congressional intention that there be two Assistant JAGs within the Department of the Navy – one a Navy judge advocate and the other a Marine judge advocate.⁷¹⁷

By statute, an Assistant JAG, while so serving, shall hold the grade of rear admiral (lower half) or brigadier general, if he is appointed to such grade by the President, by and with the advice and consent of the Senate.⁷¹⁸ The statute also recognizes that an Assistant JAG may serve in a grade lower than rear admiral (lower half) or brigadier general.⁷¹⁹ In such circumstances, if the officer concerned has served at least twelve months as an Assistant JAG, the officer may, in the discretion of the President, be retired with the rank and grade of rear admiral (lower half) or

⁷¹⁵ *Id.* § 5149(a)(2). The same Secretarial instruction and board membership rules that apply to the JAG selection board apply to the Deputy JAG selection board. *See supra* discussion at note 673.

⁷¹⁶ *Id.* § 5149(c)-(d).

⁷¹⁷ Section 5149 of title 10 was part of the JAG Corps Act of 1967, and was a product of compromise between the House and the Senate. An Act to Establish a Judge Advocate General's Corps in the Navy, Pub. L. No. 90-179, 81 Stat. 545 (1967). The House proposed the creation of two Assistant JAG (AJAG) positions – one Navy and one Marine Corps – both of which were required to be filled by officers in a flag or general officer grade. H.R. 12910, 90th Cong. (1st sess. 1967), at 113 Cong. Rec. 27483, 27484 (daily ed. Oct. 2, 1967). The Senate, reacting to the Navy's concerns about whether there were enough flag officer "numbers" to accommodate two positions, wished to create a single AJAG position, which would be filled by either a Navy or Marine flag or general officer. S. Rep. No. 90-748, 90th Cong. (1st Sess. 1967), *reprinted in* 1967 U.S.C.C.A.N. 2113, 2116. Senator Ervin sponsored a compromise amendment that created two AJAG positions – one Navy and one Marine – whose incumbents could serve as a flag or general officer and/or could retire in the higher grade. Senator Ervin noted that he viewed the Navy and Marine Corps as being "somewhat shortsighted in their unwillingness to share the flag and general officer positions with uniformed lawyers." S. Rep. 90th Cong. (1st sess. 1967), at 113 Cong. Rec. 32764 (daily ed. Nov. 16, 1967),

The concerns of Navy leadership about flag officer numbers refers to the unofficial Senate Armed Services Committee (SASC) limits on flag numbers, the so-called "Stennis Ceiling." The "Stennis Ceiling" was the popular name for an accord among members of the SASC to not recommend the confirmation of flag or general officers for any of the Services beyond agreed-upon numbers, regardless of statutory authorization. Jay M. Siegel, *Origins of the Judge Advocate General's Corps: A History of Legal Administration in the United States Navy, 1775-1967*, Government Printing Office (1997), at 678 n.12-117 (citing statement of Senator Richard B. Russell of Georgia).

⁷¹⁸ 10 U.S.C. § 5149(b)-(c).

⁷¹⁹ *Id.*

brigadier general.⁷²⁰ The President has delegated to SECNAV the authority to retire an AJAG in the grade of rear admiral (lower half) or brigadier general.⁷²¹

Under Secretarial instruction, there are currently four Assistant JAG positions within the Department of the Navy, as follows: AJAG (Civil Law); AJAG (Operations and Management); AJAG (Military Justice); and AJAG (Chief Judge).⁷²² As a matter of current administrative practice, U.S. Navy judge advocates serve as the AJAGs for Civil Law, Operations and Management, and Chief Judge, and a Marine judge advocate is detailed as the AJAG (Military Justice).⁷²³

The Assistant JAGs, under Secretarial instruction, are competitively selected by flag and general officer selection boards, which employ statutory procedures applicable to promotion selection boards to the maximum extent practicable.⁷²⁴ As a matter of policy, as reflected in Secretarial instruction, the Assistant JAGs do not serve in the grades of rear admiral (lower half) or brigadier general while on active duty, even though the Assistant JAG positions are recognized by the Secretary to be “flag and general officer equivalent positions, with duties and responsibilities commensurate with those grades.”⁷²⁵ The DON has opted to have the Assistant JAGs serve in lower grades due to the numerical limitations of flag and general officers.⁷²⁶

Also by Secretarial instruction, an officer serving as an Assistant JAG may not be retired in the grade of rear admiral (lower half) or brigadier general, unless he or she has served in an

⁷²⁰ *Id.*

⁷²¹ U.S. Dep’t of Defense, Dir. 5160.59, *Delegation of Authority Under Executive Order 11390* (Apr. 14, 2004); see Exec. Order No. 11390, 33 Fed. Reg. 841 (Jan. 22, 1968).

⁷²² U.S. Dep’t of Navy, Sec’y of the Navy Instr. 1800.3, *Retirement of the Assistant Judge Advocate General of the Navy* (3 Feb. 2009) [hereinafter SECNAVINST 1800.3].

⁷²³ Letter from VADM James W. Houck, JAGC, USN, Judge Advocate General of the Navy, to Mr. Daniel J. Dell’Orto, Chairman, Independent Review Panel (Ser 00/0106), 1 (Sep. 29, 2010) [hereinafter VADM Houck Letter (Ser 00/0106)]. The Panel notes that SECNAVINST 1800.3, itself, does not identify individual AJAG positions with officers from particular Services.

⁷²⁴ SECNAVINST 1800.3, *supra* note 722, ¶ 2.b., at 1.

⁷²⁵ *Id.* ¶ 3.a., at 2.

⁷²⁶ VADM Houck Letter (Ser 00/0106), *supra* note 723, at 1 (providing that “Section 5149 of title 10, U.S. Code, creates two statutory positions, both titled AJAG of the Navy. Per section 5149, one JAG of the Navy is an officer of the [JAG] Corps and the other is a judge advocate of the Marine Corps. Each AJAG of the Navy may hold the grade of O-7 while so serving, or, in the alternative, at the discretion of the Secretary of the Navy, may retire with the rank and grade of O-7 after at least 12 months of satisfactory service in a lower rank or grade. Based on numerical limitations of flag and general officers, the Department of the Navy has opted for the alternative practice of promoting AJAGs upon retirement.”).

Assistant JAG position for at least three years, and for at least one year has been detailed as a “statutory” Assistant JAG of the Navy.⁷²⁷ The construct of having officers serve in a “regulatory” Assistant JAG position for three years while being detailed to a “statutory” Assistant JAG position for at least one of the three years, permits the DON to rotate the “statutory” U.S. Navy Assistant JAG position among three officers. The “statutory” Marine Corps Assistant JAG position is not rotated among officers. The Marine judge advocate detailed as the Assistant JAG (Military Justice) is selected by a Marine Corps general officer promotion selection board and serves a full three years detailed as a “statutory” Assistant JAG of the Navy.

The JAG advised the Panel that, in his view, it is imperative that the judge advocate leadership structure include four Assistant JAGs, eligible for O-7 retirement.⁷²⁸ In his testimony, the JAG also stated that he was open to the idea of rebalancing the detailing of U.S. Navy judge advocates and Marine judge advocates to the four Assistant JAG positions and to using the Marine Corps Assistant JAG statute on a rotational basis as is done with the Navy JAG Corps Assistant JAG statute.⁷²⁹

The JAG also advised the Panel that in 2008, the DON developed a legislative proposal to have the Assistant JAG positions modified into permanent one-star (O-7) positions with off-setting relief provided against the overall numerical limitations for flag and general officers. This proposal was made with the support of SECNAV and the CNO, in recognition of the importance of those positions. The proposal was submitted to the Office of the Secretary of Defense (OSD), but OSD took no further action on it.⁷³⁰

The Deputy JAG and the Assistant JAGs do not have specific functions assigned to them by statute, other than succeeding to the position of the JAG in certain circumstances.⁷³¹ However, by U.S. Navy service instruction, the Deputy JAG performs

⁷²⁷ SECNAVINST 1800.3, *supra* note 722, ¶ 3.b., at 2; VADM Houck Letter (Ser 00/0106), *supra* note 723, at 1-2.

⁷²⁸ VADM Houck Letter (Ser 00/0106), *supra* note 723, enclosure (1).

⁷²⁹ VADM Houck Testimony, *supra* note 107, at 443.

⁷³⁰ *Id.* at 179-80. VADM Houck opined that a legislative proposal to make the Assistant JAGs permanent one-stars, today, was not realistic given the existing budgetary climate, and in view of SECDEF's scrutiny of flag and general officer positions. *Id.* at 180-81.

⁷³¹ 10 U.S.C. § 5149(d)-(e) (providing that: “(d) When there is a vacancy in the Office of the Judge Advocate General, or during the absence or disability of the Judge Advocate General, the Deputy Judge Advocate General shall perform the duties of the Judge Advocate General until a successor is appointed or the absence or disability

a significant U.S. Navy Service-specific function as Commander, Naval Legal Services Command (NLSC).⁷³² NLSC has principal responsibilities within the U.S. Navy for the delivery of courts-martial services, legal assistance services, and the provision of command advice to commands lacking their own dedicated staff judge advocate.⁷³³ Also, with regard to the NLSC command structure, the Assistant JAG (Operations and Management) serves as the NLSC Deputy Commander for Region Legal Services Offices.⁷³⁴

The JAG has assigned to OJAG an additional function to support the JAG in the execution of his role as the Special Assistant for Legal Services to the CNO.⁷³⁵ It

ceases. (e) When subsection (d) cannot be complied with because of the absence or disability of the Deputy Judge Advocate General, the Assistant Judge Advocates General, in the order directed by the Secretary of the Navy, shall perform the duties of the Judge Advocate General.”).

⁷³² NLSC is an echelon 2 command in the U.S. Navy under the cognizance of the CNO. See OPNAVNOTE 5400, *supra* note 34, enclosure (4); see also OPNAVINST 5450.189B, *supra* note 34, ¶ 3.b., at 1. The latter instruction was signed by the JAG under his authority as the Special Assistant to the CNO for Legal Services. It states that the Secretary of the Navy directed that the Deputy JAG be assigned as the Naval Legal Service Command (NLSC) Commander on January 31, 1989 in order to permit the JAG to perform his primary duty of providing advice and support to the Secretary of the Navy, the CNO, and the Commandant; and to separate the formulation of Navy legal policy from the provision of legal services in the field. The Panel notes that the JAG’s statutory role to provide advice to the Commandant was eliminated subsequent to the 1989 designation of the Deputy JAG to serve as the NLSC Commander. As noted earlier, currently the SJA to CMC is the only uniformed lawyer with statutory responsibility to advise the Commandant.

⁷³³ See OPNAVINST 5450.189B, *supra* note 34, enclosure (1); see also VADM Houck Testimony, *supra* note 107, at 79-80, 105-08; VADM Houck Presentation, *supra* note 4, at 30-38.

⁷³⁴ VADM Houck Testimony, *supra* note 107, at 104-05; VADM Houck Presentation, *supra* note 4, at 37. The Assistant JAG (Operations and Management) used to serve as the NLSC Vice Commander, but those duties were changed as part of NLSC realignment on October 1, 2010. VADM Houck Testimony, *supra* note 107, at 102-03. The Vice Commander position was eliminated and separate Deputy Commanders were established for RLSOs and NLSOs, in order to enhance the independence of the defense function (which resides within NLSOs) and the accountability for both the prosecution (RLSO) and defense (NLSO) functions. DoD IG Report, *supra* note 377, ¶ 8., at 62. As briefed to the Panel, the JAG has established separate chains of command within NLSC for the defense and prosecution functions, and is considering establishment of a separate Trial Defense Command. VADM Houck Testimony, *supra* note 107, at 99-100; VADM Houck Presentation, *supra* note 4, at 36. Currently, the U.S. Navy is the only Service that does not have a separate defense function. DoD IG Report, *supra* note 377, at 61-62; see also VADM Houck Testimony, *supra* note 107, at 99-100 (stating that the Trial Defense Command “isn’t a novel concept. All the other services have this, and I believe . . . that we need to go there.”).

⁷³⁵ “As a staff office within Navy Secretariat, the Office of the Judge Advocate General’s Corps (OJAG’s) [sic] primary mission is to support the Judge Advocate General (JAG) in providing legal and policy advice to the Secretary of the Navy. In addition, OJAG supports JAG in advising and assisting the Chief of Naval Operations in formulating and implementing policies and initiatives pertaining to the provision of legal services within the Navy.” <http://www.jag.navy.mil/organization.htm>; see also JAGINST 5400.1A, *supra* note 351, ¶¶ 101.-102.a., at 1-1. The Panel notes that, technically, the JAG is in the Office of the Secretary and OJAG is in the executive part of the Department.

follows, therefore, that all the Assistant JAGs support the JAG in fulfilling his assigned U.S. Navy Service functions.

Before turning to the question of whether the JAG requires any additional authority over manpower policies or assignments, the Panel desires to take this opportunity to comment on both the rank and composition of the Assistant JAG positions within the Department of the Navy.

The Panel strongly supports the JAG's view that these positions are vitally important to the Department. The Panel also concurs that the Assistant JAG positions are "flag and general officer equivalent positions, with duties and responsibilities commensurate with those grades."⁷³⁶ Accordingly, the Panel believes these positions warrant flag/general officer rank. The Panel notes that there are only three active-duty flag/general officer judge advocate positions within a Department that includes two military services, and currently has more than 1,200 active-duty judge advocates. This is a ratio of less than one-quarter of one percent of active-duty judge advocate end-strength.⁷³⁷ The Panel further believes that the existing scheme, whereby the Assistant JAGs receive "tombstone" promotions upon retirement after having served as captains or colonels, has a tendency to undermine both the integrity of the offices of the Assistant JAGs, and the credibility of the Navy and Marine judge advocate communities as a whole. In a less constrained fiscal environment, consistent with the DON's previous legislative proposal, the Panel would recommend that the Assistant JAG positions be converted into permanent O-7 positions with off-setting relief from flag and general officer numerical limits.⁷³⁸ However, given the existing budgetary climate the Panel believes it is unrealistic to make such a recommendation at this time.

⁷³⁶ SECNAVINST 1800.3, *supra* note 722, ¶ 3.a., at 2.

⁷³⁷ Although inter-Service and inter-Department comparisons have limited utility in defining requirements, to the extent they provide relevant benchmarks, the Panel notes that the Army has 5 active component general officers for an active component judge advocate inventory of more than 1,800 officers, and the Air Force has 6 active component general officers for an active component judge advocate inventory of more than 1,200 officers. See Tables 2 & 8, *supra* Section I.D. and Section III.A.

⁷³⁸ See VADM Houck Testimony, *supra* note 107, at 178-81; see VADM Houck Presentation, *supra* note 4, at 65; see VADM Houck Letter (Ser 00/0106), *supra* note 723, enclosure (1).

Lastly, the Panel applauds the JAG's willingness to consider rebalancing the four Assistant JAG positions between the U.S. Navy and the Marine Corps. In the view of the Panel, two of the Assistant JAG positions should be filled by Marine judge advocates and two filled by U.S. Navy judge advocates. Accordingly, the Panel recommends that the DON consider adopting the rotational process now being used by the U.S. Navy⁷³⁹ to support the service of two Marine judge advocates and two U.S. Navy judge advocates in four "regulatory" Assistant JAG positions, with each Service rotating the formal "detailing" of its respective officers to the "statutory" Assistant JAG positions in order to make the officers eligible to retire as a rear admiral (lower half) or brigadier general.

7. Whether Additional Authority for the JAG Over the Manpower Policies and Assignments of Navy Judge Advocates is Warranted?

In answering the foregoing question, the Panel believes it especially important to emphasize three bedrock principles of authority within the Department of the Navy, which are founded upon law, regulation, and doctrine. One, naval forces, of necessity, are organized and operate under decentralized command and control.⁷⁴⁰ This decentralized organization requires a culture in the sea Services in which responsibility and authority are pushed to the lowest practical level.⁷⁴¹ Two, delegation of authority is an essential element of decentralized command and control.⁷⁴² And three, authority must be commensurate to responsibility.⁷⁴³

⁷³⁹ See VADM Houck Testimony, *supra* note 107, at 178-81; see VADM Houck Presentation, *supra* note 4, at 65; see VADM Houck Letter (Ser 00/0106), *supra* note 723, enclosure (1).

⁷⁴⁰ See Office of the Chief of Naval Operations, *Naval Command and Control (NDP 6)*, 54 (19 May 1995) [hereinafter *NDP 6*] ("The pace, complexity, and dispersed nature of modern naval warfare demand that command be decentralized during execution. The on-scene commander must be free to exercise initiative based on his understanding of the situation and his knowledge of the commander's intent.").

Within DoD "command and control" means: "The exercise of authority and direction by a properly designated commander over assigned and attached forces in the accomplishment of the mission. Command and control functions are performed through an arrangement of personnel, equipment, communications, facilities, and procedures employed by a commander in planning, directing, coordinating, and controlling forces and operations in the accomplishment of the mission." Joint Chiefs of Staff, Joint Publication 1-02, *Department of Defense Dictionary of Military and Associated Terms*, 65 (8 Nov. 2010, as Amended Through 31 Dec. 2010). Doctrinally, the Naval Services have adopted the DoD definition. See generally *NDP 6, supra*.

⁷⁴¹ Admiral John C. Harvey, Jr., Commander, U.S. Fleet Forces, *Serial 002 - Command and Control*, ¶ 2., at 1 (undated).

⁷⁴² See NAVREGS, *supra* note 17, art. 1022 (stating that: "The delegation of authority and the issuance of orders and instructions by a person in the naval service shall not relieve such person from any responsibility imposed upon him or her. He or she shall ensure that the delegated authority is properly exercised and that his or her orders and instructions are properly executed."). Under Navy Regulations article 0312, the Secretary has

With that as background, the Panel finds that the Secretary and the CNO have assigned the JAG responsibilities as a “capability sponsor,” to include a specific responsibility – “to build a coherent legal community.”⁷⁴⁴ That specific responsibility – “to build” – is identified separately from the responsibilities to monitor staffing levels and advise the CNO on the distribution of judge advocate assets.⁷⁴⁵ It appears, in short, that the responsibility “to build” entails more than merely monitoring the judge advocate community and making recommendations to the CNO concerning the distribution of manpower assets.

As we discussed in detail in Section II of the report, *supra*, under the Navy's governing manpower regulation, the JAG is not a Budget Submitting Office (BSO)⁷⁴⁶ and he has no authority to generate or modify judge advocate manpower determination made by BSOs. In addition, while the JAG has influence in the judge advocate manpower determinations made by BSOs and in the management of the judge advocate community within the Bureau of Naval Personnel, his input is informal and non-binding.

The JAG's lack of authority within the Navy's manpower management system is not entirely remedied by his standing “organizational authority” as a Staff Assistant to the Secretary, or by his command authority within OJAG, or by his delegated authority as the Chief of the JAG Corps. Simply stated, those latter general authorities do not extend to or include specific authorizations within the Navy manpower management system, commensurate to the assigned responsibility to build a coherent legal community.

promulgated standing delegations of authority to his staff assistants — within prescribed limits — to organize their commands or offices. “Subject to the approval or guidance of the Secretary of the Navy, the Civilian Executive Assistants, the Chief of Naval Operations, the Commandant of the Marine Corps and the *Staff Assistants* are individually authorized to organize, assign and reassign responsibilities *within their respective commands or offices*, including the establishment and disestablishment of such component organizations as may be necessary” *Id.* art. 0312 (emphasis added).

⁷⁴³ Article 0702 of the Navy Regulations provides in pertinent part: “Commanders shall be responsible for the satisfactory accomplishment of the mission and duties assigned to their commands. *Their authority shall be commensurate with their responsibilities.*” *Id.* art. 0702 (emphasis added.)

⁷⁴⁴ SECNAVINST 5430.27C, *supra* note 15, ¶ 3., at 1; OPNAVNOTE 5430, *supra* note 24, ¶ 14. of enclosure (1).

⁷⁴⁵ OPNAVNOTE 5430, *supra* note 24, ¶ 14 of enclosure (1) (providing in pertinent part: “As the JAG Corps capability sponsor, [the JAG is] responsible for building a coherent legal community, monitoring staffing levels and workload trends, and advising CNO concerning the appropriate distribution of assets to ensure the effective and efficient provision of legal services.”)

⁷⁴⁶ See generally OPNAVINST 1000.16K, *supra* note 47. In response to Panel questioning, the JAG stated that he did not need to be a Budget Submitting Office (BSO) within the Navy and that if he were a BSO it would entail significant investment in overhead. VADM Houck Testimony, *supra* note 107, at 241-43.

The Panel recommends, therefore, that the Secretary and the CNO identify, in coordination with the JAG, the specific authorities that are required to fully execute the JAG's assigned capability sponsorship duties, including his assigned responsibility to build a coherent legal community.⁷⁴⁷ Once those authorities are identified, they should be assigned to the JAG by instruction or regulation, or both.

With regard to the assignment of U.S. Navy judge advocates, the JAG already has all the authority necessary, by operation of Article 6 of the Uniform Code of Military Justice (UCMJ).

8. Whether Additional Authority for the JAG Over the Manpower Policies and Assignments of Marine Judge Advocates is Warranted?

With regard to the authority of the JAG over the manpower policies and assignments of Marine judge advocates, the Panel notes that currently the JAG's authority is limited to:

- command authority over Marine judge advocates assigned to OJAG;
- certification of trial and defense counsel and military judges, under Article 27(b) of the UCMJ;
- certification to perform legal assistance services, under chapter 53, section 1044 of title 10;
- designation of Marine officers as “judge advocates” under Secretarial regulation;⁷⁴⁸ and

⁷⁴⁷ The Panel notes that the role of a “capability sponsor” is not defined in the Navy's Manpower Management System. However, the terms CAPABILITY and SPONSOR are separately defined as follows:

- “CAPABILITY: The ability to execute a specified course of action.” OPNAVINST 1000.16K, *supra* note 47, appendix B to enclosure (1), at B-3.

- “SPONSOR: A broad term covering responsibilities assigned a command, bureau, or office in support of a designated project. Sponsor responsibility may include: justification of funds, program objectives, technical guidance, procurement, manpower, training, and other means.” *Id.* appendix B to enclosure (1), at B-17. Although OPNAVINST 1000.16K provides that the Chief of Naval Personnel is the “Single Manpower Resource Sponsor” for CNO, it also recognizes and assigns to warfare enterprises and enablers, formal authorities for influencing manpower policies across BSOs. *Id.* ¶ 6. of enclosure (1), at 1-4. The Panel notes that such a system may serve as a model for the JAG.

⁷⁴⁸ U.S. Dep't of Navy, Sec'y of Navy Instr. 1120.9A, *Designation of Officers of the Regular Marine Corps and Marine Corps Reserve as Marine Corps Judge Advocates*, ¶ 4., at 2 (25 Oct. 1988). This regulation delegates authority to the JAG to determine whether an officer may be designated a “judge advocate” within the Marine Corps, and thereby practice law in general, irrespective of practice area. *Id.* ¶ 6.g., at 3. The requirements for designation are: (1) to be recommended by the Commandant, and (2) to be certified by the JAG under Article 27(b). *See id.*

- professional supervision (i.e., establishing and enforcing standards of professional conduct) under Secretarial regulation.⁷⁴⁹

The JAG has no authority or direct role in the Marine Corps manpower management system or in the assignment of judge advocates in the Marine Corps.

The JAG testified that he did not believe that new or additional authority for the JAG with respect to manpower policies and assignments was warranted, arguing instead that his indirect oversight role at the Department level was adequate. Specifically, the JAG stated,

Within the Marine Corps, I do not believe that the JAG needs additional authority. What I do believe is that there is a close dialogue required with the [S]taff [J]udge [A]dvocate to the Commandant to include an aggressive Article 6 inspection program⁷⁵⁰ that the SJA is able to carry out and has the authority to carry out.

If we were properly configured within the Marine Corps – and I believe that we are not, and I also believe that there [are] some delegations that we can do productively at the [S]ecretariat level – if we were to do those things, which are within our power to do and we are on the threshold of doing, irrespective of any other changes that could be contemplated, I believe that we would have the right authority for the JAG, the right authority for the SJA to CMC, and that in those events where the JAG observed that things in the Marine Corps were not to the JAG's liking in terms of the delivery of legal services, that, in those extreme – and I believe they would be extreme – circumstances, that the JAG has the ability to go to the Secretary and to raise these issues with the Secretary, who certainly has the ability to then speak to the Commandant about it and to deal with it that way. So I don't believe, to be specific about it, that the JAG needs a direct line of authority over the [S]taff [J]udge Advocate to the Commandant.⁷⁵¹

The Panel concurs that, to the extent the JAG's departmental responsibilities require oversight of manpower management and assignments of Marine judge advocates, he can adequately exercise that role with his current title 10 and regulatory authorities.

⁷⁴⁹ SECNAVINST 5430.27C, *supra* note 15, ¶ 4.c., at 3.

⁷⁵⁰ The SJA to CMC conducts Article 6 inspections in the Marine Corps under longstanding agreement with the JAG. *LEGADMINMAN*, *supra* note 46, ¶ 22004., at 22-5.

⁷⁵¹ VADM Houck Testimony, *supra* note 107, at 244-45.

The Panel further finds that additional authority for the JAG over Marine judge advocate manpower policies and assignments is not necessary or warranted. The responsibility for manpower policies and assignments within the Marine Corps has historically been assigned to the Commandant by both statute and regulation.⁷⁵² The Panel believes the Commandant, with the assistance of the SJA to CMC, is effectively managing judge advocate manpower (i.e., structure, inventory, and assignments) to meet Service, Departmental, and Joint legal requirements, and to ensure community health (i.e., recruiting, retention, and education) and proper career progression (i.e., promotions) for Marine judge advocates.⁷⁵³ Moreover, the JAG is not in the best position to exercise additional authority in these areas within the Marine Corps, given the Service's unique requirements for community health and career progression of Marine judge advocates.⁷⁵⁴ Lastly, transferring authority from the Commandant to the JAG could marginalize the SJA to CMC as a legal voice within his Service. This marginalization would be contrary to the Panel's view, as described later in this report, that the role of the SJA to CMC needs to be clarified and strengthened.

⁷⁵² See U.S. House Conference Report, *Goldwater-Nichols Department of Defense Reorganization Act of 1986 to Accompany H.R. 3622* (H. Rep. No. 99-824) (1986). Congress recognized that "each service should have a separate military headquarters staff within the executive part of its Military Department" which should "continue to conduct the functions for which the effective representation of the military point of view is invaluable Key among these functions are: (1) manpower and personnel. . . ." *Id.* at 151. Congress grants authority to the Commandant for organizing, training, administering and maintaining Marine forces, to be executed under Secretarial direction and control. 10 U.S.C. §§ 5013, 5042. The Secretary has also delegated specific manpower functions to the Commandant by regulation, including the ability: "To plan for and determine the present and future needs, both quantitative and qualitative, for manpower, including reserve and civilian personnel, of the United States Marine Corps." NAVREGS, *supra* note 17, art. 0505., ¶ 2.e., at 31. With respect to judge advocates specifically, Congress provides: "The **assignment for duty** of judge advocates of the Marine Corps shall be made by *direction of the Commandant of the Marine Corps.*" 10 U.S.C. 806(a) (emphasis added).

⁷⁵³ See Section II, *supra*, and VI.B.3., *infra*, for further elaboration on the effectiveness of the Marine Corps' manpower policies and assignments of judge advocates.

⁷⁵⁴ See generally Chairman, Joint Chiefs of Staff Report, *Roles, Missions, and Functions of the Armed Forces of the United States*, III-48 to -49 (Feb. 1993) (stating: "Moreover, while judge advocates have common legal skills, they serve first as officers of their particular Services, subject to the same performance standards, regulations, policies, and procedures as all other officers of their Service. Their practice of law is predicated upon, and intertwined with, the unique force structure, operational context, and policy decisions of their Service.").

B. Staff Judge Advocate to the Commandant

1. Departmental and Service Role

a) Statutory Role

In chapter 506, section 5046 of title 10 – the SJA to CMC establishment statute – Congress provides that the SJA to CMC shall be appointed by the President from amongst judge advocates of the Marine Corps, and *while so serving* hold the grade of major general.⁷⁵⁵ Appointments will be based on a recommendation from the Secretary of the Navy (SECNAV), which in turn will be based on a recommendation of a board of officers, constituted and convened by SECNAV.⁷⁵⁶

The statutory position of the SJA to CMC is found in chapter 506, which addresses the composition and function of Headquarters, Marine Corps, one of the four military Service staffs presided over by the respective Service Chiefs – in this case the Commandant.⁷⁵⁷ As with any staff officer within Headquarters, Marine Corps, the SJA to CMC can furnish professional assistance to the Secretary and perform duties under the authority, direction, and control of the Secretary of the Navy – if the Secretary were to so prescribe. The SJA to CMC’s position on the Service staff is consistent with that of the Judge Advocates General of the Army and Air Force.⁷⁵⁸

Beyond these general duties to support the Commandant and the Secretary of the Navy, section 5046(c) of title 10 provides that the SJA to CMC shall serve as legal advisor to the Commandant, stating: “No officer or employee of the Department of

⁷⁵⁵ 10 U.S.C. § 5046(a) (emphasis added). The language *while so serving* will be discussed further, *infra*.

⁷⁵⁶ *Id.* § 5046(b).

⁷⁵⁷ *See id.* §§ 5041-5046 (establishing Headquarters, Marine Corps, and the leadership positions within Headquarters, Marine Corps, and are structured within title 10 under chapter 506 entitled “Headquarters, Marine Corps”).

⁷⁵⁸ *Compare* 10 U.S.C. § 5046 (2010) (“No officer or employee of the Department of Defense may interfere with . . . the ability of the Staff Judge Advocate to the Commandant of the Marine Corps to give independent legal advice to the Commandant of the Marine Corps”), *with* 10 U.S.C. §§ 3031, 8031 (the function of the Army and Air Staffs, of which the judge advocates general are a part, is to assist the respective Secretary in carrying out his responsibilities).

Defense may interfere with – (1) the ability of the [SJA to CMC] to give independent legal advice to the Commandant of the Marine Corps”⁷⁵⁹

Also, as a “Staff Judge Advocate” the SJA to CMC has the statutory authority under Article 6 of the UCMJ to communicate directly with the Commandant and subordinate judge advocates.⁷⁶⁰

Apart from these duties, Congress does not expressly assign any other functions to the SJA to CMC. As such, the SJA to CMC has no statutory role with respect to supervision, manpower policies, or assignments.⁷⁶¹ As the Marine Corps’ *Legal Service Support Master Plan 1990-2000* expressed it: “The Staff Judge Advocate to the Commandant has no express statutory duties other than those which any Staff Judge Advocate has under the UCMJ.”⁷⁶²

Before turning to the SJA to CMC’s regulatory role, the Panel notes that the operative “while so serving” language in section 5046 of title 10 has resulted in Marine Corps officers serving as the SJA to CMC in a permanent grade of colonel and a temporary “while so serving” grade of major general or brigadier general.⁷⁶³ This construct is inconsistent with the general statutory framework for promotion of officers to major general (O-8) rank within the DoD. Generally, under chapter 36 of title 10, other officers considered for promotion to the grade of O-7 (brigadier general) or O-8 (major general) are selected by a board convened by the respective Secretary and, if nominated and confirmed, they are promoted to the permanent grade of O-7 or O-8 as appropriate.⁷⁶⁴ Marine officers, like their counterparts in the Army and Air Force, may be temporarily promoted to general (O-10) or lieutenant general (O-9) ranks *while serving in*

⁷⁵⁹ 10 U.S.C. § 5046(c).

⁷⁶⁰ *Id.* § 806(b).

⁷⁶¹ The Senate report accompanying the 1986 legislation enacting 10 U.S.C. § 5046 suggests that Congress had a different intent for the role of the SJA to CMC. It states: “this position serves as the legal advisor to the Commandant, as well as oversees those Marine Corps officers designated as judge advocates by the Judge Advocate General of the Navy.” USMC SAP, *supra* note 42, at 12 (quoting S. Rep. No. 99-331, at 223 (1986), 1986 U.S.C.C.A.N. 6413, at 6418).

⁷⁶² U.S. Marine Corps, *Legal Service Support Master Plan 1990-2000*, ¶ C04. of annex C, at C-II (21 Dec. 1989) [hereinafter *1990 Master Plan*].

⁷⁶³ 10 U.S.C. § 5046(a). The SJA to CMC position was made a temporary major general (O-8) position in 2008. Previously, the position was a permanent brigadier general position. Duncan Hunter National Defense Authorization Act for Fiscal Year 2009, Pub. L. No. 110-417, 122 Stat. 4356 (2008); SJA to CMC *Submission*, *supra* note 38, at 54-55.

⁷⁶⁴ See 10 U.S.C. § 611(a).

positions “of importance and responsibility” under section 601 of title 10.⁷⁶⁵ Such officers typically continue to carry their permanent major general (O-8) appointment *while serving* in the temporary grades of O-9 or O-10 in the designated “601 position.”⁷⁶⁶ The Panel also notes that all judge advocates of any Service who are promoted to the grade of O-8 to serve as Deputy JAG within their respective Services and Departments are promoted by permanent appointment.⁷⁶⁷ For example, today, the Deputy JAG of the Navy is a permanent rear admiral (O-8), having been promoted to that position from the grade of captain (O-6). In comparison, the SJA to CMC is a temporary major general (O-8) who still holds his permanent rank of colonel. Finally, the Panel notes that section 525 of title 10 excludes the position of SJA to CMC from the numerical limits for general officers within the Marine Corps.⁷⁶⁸ Accordingly, the Panel recommends legislation to amend section 5046 of title 10 to allow for the permanent appointment of the SJA to CMC to the grade of O-8.

b) Regulatory Role

The Secretary of the Navy has assigned the SJA to CMC certain Service-level duties through Secretarial regulation. The foremost among these duties are to:

- advise the Commandant in military justice, civil and administrative law, operational law, legal assistance matters, and any other matters as directed by the Secretary and the Commandant;
- act as the legal advisor to Headquarters, Marine Corps, and all other offices of the Marine Corps, for matters under the cognizance of the SJA to CMC;
- serve as Director, Judge Advocate Division (JAD), including direct supervisory authority over all active and reserve judge advocates, civilian attorneys, and legal support personnel assigned to JAD;
- serve as the Occupational Field Manager for all active-duty Marine judge advocates and advise the Deputy Commandant, Manpower and Reserve Affairs, regarding which Marine judge advocates are best suited to fill particular billets;

⁷⁶⁵ *Id.* § 601(a).

⁷⁶⁶ *Id.* § 601(b)(1).

⁷⁶⁷ *Id.* §§ 5149(a)(1), 3037(a), 8037(d)(1).

⁷⁶⁸ *Id.* § 525(b)(1)(B) (2010).

- oversee the Chief Defense Counsel of the Marine Corps;
- conduct annual inspections to ensure that Marine Corps law centers are functioning properly and efficiently;
- serve as Rules Counsel for matters of professional responsibility involving Marine judge advocates or civilian attorneys under his cognizance and reports to the JAG regarding oversight of professional responsibility matters in the Marine Corps; and
- provide legal advice on standards of conduct and government ethics, together with the Counsel for the Commandant.⁷⁶⁹

The SJA to CMC, in his Service level role and as part of Headquarters, Marine Corps, may address the delivery of legal services in the Marine Corps by acting through the broad statutory authority of the Commandant. For example, the SJA to CMA may sponsor Service regulations, but only to the extent such action does not impinge on, and remains consistent with, the JAG's exclusive authorities under the UCMJ, chapter 53 of title 10, Navy Regulations, and Secretarial instructions.⁷⁷⁰

Service regulations establish the SJA to CMC as the Occupational Field Manager and Functional Advocate for the legal community within the Marine Corps manpower management system, including the duties to:⁷⁷¹

⁷⁶⁹ SECNAVINST 5430.27C, *supra* note 15, ¶ 8., at 5-6.

⁷⁷⁰ See 10 U.S.C. §§ 5043 (establishing the statutory duties of the Commandant); *see also* MajGen Ary Testimony, *supra* note 242, at 388-94. The SJA to CMC aptly illustrated the extent of this authority during his testimony to the Panel on September 1, 2010, stating,

When I released a couple MARADMINS earlier . . . on the Case Management System, I relied on the general authority of the Commandant . . . I don't want to get into a debate about whether the specific authority of the Navy JAG under Chapter 47, the UCMJ, outweighs the Service requirement of the Commandant and general authority. Arguably, the specific does control and the Navy JAG, if I release something on a post-trial checklist and he comes out with another one two weeks later, applying it to all the Service[s] . . . then I guess mine is outdated, you know, a few weeks later.

MajGen Ary Testimony, *supra* note 242, at 388.

⁷⁷¹ MCO 5311.1D, *supra* note 47, ¶ 8. of enclosure (1), at 25.

- serve as the principal point of contact between the Commandant and the total force with regard to capabilities and force structure, intended structural changes, training, and unique operational considerations pertaining to the 44XX occupational field;
- advise the Commandant on derivation of capabilities and force structure; and
- assist in the classification, training, and career progression of personnel within the 44XX occupational field.

However, these Service regulations do not expressly assign the SJA to CMC any supervisory role over judge advocates as a whole, beyond the limited role already provided in Secretarial instruction. As succinctly stated in the *Legal Service Support Master Plan 1990-2000*:⁷⁷²

Although [the SJA to CMC] serves as the occupational field sponsor for judge advocates, legal services officers and enlisted, he does not exercise any supervisory authority over such personnel. Such authority remains with the chain of command, except [where] ultimate authority lies with the Judge Advocate General.⁷⁷³

2. Deputy SJA

Within JAD, Headquarters, Marine Corps, the SJA to CMC is assisted by the Deputy SJA to CMC (DSJA to CMC). The position of DSJA to CMC is not established by statute, but rather is established by Headquarters, Marine Corps Table of Organization. The billet is structured for a Marine judge advocate in the grade of colonel. The Deputy SJA to CMC reports to the SJA to CMC and in the absence of the SJA to CMC, the Deputy acts as the SJA to CMC.⁷⁷⁴ The DSJA to CMC has no statutory role; the authorities and responsibilities of the billet are determined by the SJA to CMC. Generally, the DSJA to CMC's duties are to assist the SJA to CMC with the execution of all of his respective responsibilities. His duties include serving as the reporting

⁷⁷² 1990 Master Plan, *supra* note 762, ¶ 4. of annex C, at C-III. See generally U.S. Marine Corps, *Marine Corps Legal Services Study* (May 1969) (The Commandant made a conscious decision to continue with a de-centralized model and only a Service Chief legal advisor role for the Staff Legal Officer and Director of JAD).

⁷⁷³ 1990 Master Plan, *supra* note 762, ¶ 4. of annex C, at C-III.

⁷⁷⁴ By way of example, the Panel notes that the current SJA to CMC, MajGen Ary, was previously assigned as the Deputy SJA to CMC, in the grade of O-6, and in that position he was required to serve as Acting SJA to CMC from August 2009 until March 2010, after the retirement of the previous SJA to CMC, but before a selection board was convened, conducted, and the nominee appointed to be the next SJA to CMC.

senior and providing direct supervision over all of the Marines and civilians and their respective functions within JAD.

As explained in Section VI.C., *infra*, the Panel recommends “clarifying and strengthening the role of the SJA to CMC for supervision of the administration of military justice in the Marine Corps, for the delivery of legal assistance services within the Marine Corps, and for the professional and technical supervision of Marine judge advocates.”⁷⁷⁵ If the role of the SJA to CMC is clarified and strengthened,⁷⁷⁶ the Panel believes it will be important for the Marine Corps to review the role and functions of the DSJA to CMC, to ensure that the DSJA to CMC is positioned to effectively assist the SJA to CMC in fulfilling a greater role in the supervision of the delivery of legal services within the Marine Corps.⁷⁷⁷

3. Whether Additional Authority for the SJA to CMC Over the Manpower Policies and Assignments of Marine Judge Advocates is Warranted?

As discussed, the SJA to CMC has no statutory authority with respect to manpower policies and assignments, but does have a regulatory role as the 44XX Occupational Field Manager and Functional Advocate. As discussed in Section II, *supra*, of the report, the Marine Corps has institutionalized the Occupational Field Manager and Functional Advocate role such that the SJA to CMC has an effective voice in the formulation and application of manpower policies and the assignments of judge advocates.

The Panel heard testimony and received written statements, studies, and policy documents, all of which confirmed that the Marine Corps has an effective manpower management system that deliberately and systematically identifies legal requirements within the organizational structure of the Marine Corps, then funds and builds an active-duty inventory to support those requirements. This system effectively integrates the SJA to CMC as the 44XX

⁷⁷⁵ See discussion *infra* in Section VI.C.

⁷⁷⁶ As discussed further in Section VI.C., *infra*, there is widespread agreement that the role of the SJA to CMC needs to be clarified and strengthened. The Secretary of the Navy has advised the Panel that he is committed to pursuing both regulatory and statutory changes to clarify and strengthen the role of the SJA to CMC.

⁷⁷⁷ The Panel notes, as a point of reference, that all of the JAGs have Deputies who are permanent flag or general officers serving in rear admiral (upper half) or major general (O-8) grades, with significant duties, which are expressly established by regulations, orders and instructions. See 10 U.S.C. §§ 3037, 5149, 8037.

Occupational Field Sponsor and Functional Advocate. Largely as a result of the SJA to CMC's active role, this system has produced the following results over the last 10 years:

- identifying, validating, funding, and building an inventory for an additional 32 structured billets to address enduring augmentation requirements for operational units deployed in support of Overseas Contingency Operations;
- adding 27 billets to address additional permanent operational law requirements;
- re-coding unstructured legal requirements to reflect permanent 4402 requirements;
- re-aligning organizational legal structure to better meet mission requirements; and
- re-coding 60 of an eventual 408 total structured 4402 billets to require advanced formal legal education.⁷⁷⁸

This same manpower management system also effectively assigns the right judge advocate to the right billet. This deliberate, systematic staffing process assigns judge advocates to properly established Service, Department, and Joint legal requirements, and to a proportionate share of B-Billets, to ensure proper career development and to meet the broader mission requirements of the Marine Corps. This system seems to give heavy weight to the recommendations of the SJA to CMC, as the 44XX Occupational Field Sponsor, as illustrated by the testimony of the Director of Manpower Planning and Policy for Headquarters, Marine Corps. The Director testified that the Officer Assignments section within Headquarters, Marine Corps historically adopts between 98-99% of the SJA to CMC's assignment recommendations, and most recently in FY 10 adopted 100% of his recommendations.⁷⁷⁹ Further, the system effectively integrates SJA to CMC initiatives to improve the assignment process, such as the initiative to re-code important 4402 leadership and practice area billets to require the staffing of these billets with judge advocates who have obtained formal specialized legal education. As a result, the Panel does not believe additional authority for the SJA to CMC over manpower policies and assignment of Marine judge advocates is warranted.

⁷⁷⁸ See MajGen Ary Testimony, *supra* note 242, at 328-36; see SES Applegate Testimony, *supra* note 155, at 127-34; see SJA to CMC Submission, *supra* note 38, at 10-11, 27.

⁷⁷⁹ SES Applegate Testimony, *supra* note 155, at 156-57; see also Col Ewers Testimony, *supra* note 155, at 145-46.

C. Potential Statutory or Regulatory Changes to the Roles and Functions of the JAG and the SJA to CMC

At its initial hearing on September 1, 2010, both the JAG and the SJA to CMC advised the Panel that the role of the SJA to CMC needed to be clarified and strengthened to ensure the effective delivery of legal services within the Marine Corps. Specifically, the JAG agreed that the SJA to CMC needed authority necessary to “unify the Marine Corps legal community,” and to “establish policies and procedures within the Marine Corps legal community . . . to include overseeing the execution of UCMJ responsibilities within the Marine Corps, as well as the delivery of legal assistance services”⁷⁸⁰ There was also a consensus that the SJA to CMC needed “to have a prominent role in the professional ethics and supervision of Marine Corps attorneys.”⁷⁸¹

There was disagreement, however, over the historical root causes for why the role of the SJA to CMC needed to be clarified and strengthened, as well as over the best method to clarify and strengthen the role of the SJA to CMC. While both the JAG and SJA to CMC commented favorably on their collaborative efforts to clarify and strengthen the role of the SJA to CMC in a revision to Secretarial instruction,⁷⁸² there was disagreement over whether a Secretarial instruction, alone, was a sufficient basis upon which the SJA to CMC could exercise additional authority or whether it was also necessary to base additional authority in statute. Following the September 1, 2010 hearing, the Panel sent a letter dated September 27, 2010 to the Secretary of the Navy requesting the DON position on potential regulatory and legislative changes concerning the role and functions of the SJA to CMC. The Panel also invited the Secretary to include the positions of the CNO and the Commandant on this matter.

The Secretary of the Navy replied to the Panel by letter of November 5, 2010, and in that letter he included the written comments of the CNO (dated October 21, 2010) and the Commandant (dated October 29, 2010). The Secretary’s response also referenced the draft report of the DoD IG. At that point in time, the Panel did not have access to the draft DoD IG Report. However, on December 10, 2010, the Panel received and considered the Final Report of

⁷⁸⁰ VADM Houck Testimony, *supra* note 107, at 248.

⁷⁸¹ *Id.*

⁷⁸² As a technical matter of administrative law, the Panel notes that the role of the SJA to CMC could be strengthened by regulatory action and delegations of authority.

the DoD Inspector General (IG), titled *Evaluation of Post-Trial Reviews of Courts-Martial within the Department of the Navy (DoD IG Report)*.

The Panel has decided that the best way to present the issue of the roles and functions of the SJA to CMC is to recite the respective positions of the principals in roughly the same order in which they were received by the Panel. Thus, the Panel will present first the position of the SJA to CMC, then the position of the JAG, the CNO, the Commandant, and the Secretary of the Navy, respectively. Finally, the Panel will present those portions of the *DoD IG Report* that address potential changes to the role and functions of the SJA to CMC.

The Panel advises the reader to note that the following positions are presented in the voices of the respective proponents.

1. The SJA to CMC's Position

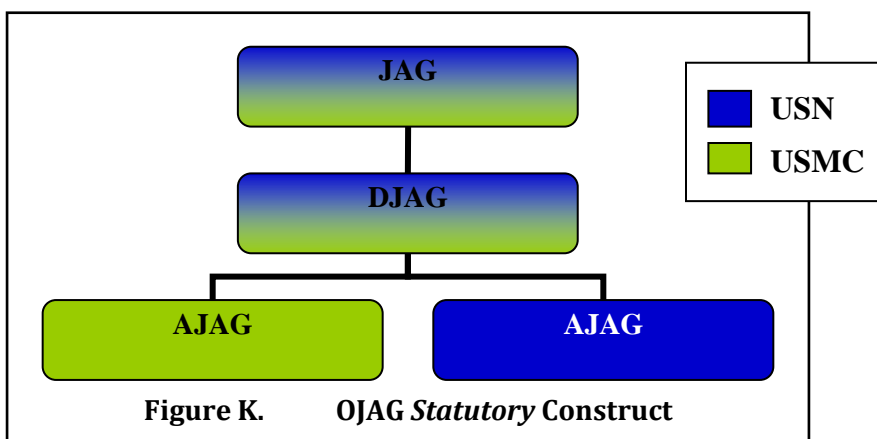
The SJA to CMC stated that the chronic systemic challenges in post-trial processing within the Department that are of concern to Congress were caused by fundamental leadership issues, rather than resource constraints.⁷⁸³ These fundamental leadership issues include: lack of balance in the leadership billets within the Office of the Judge Advocate General (OJAG), lack of well-defined leadership roles and authorities for the SJA to CMC, and complete de-centralization of legal services.⁷⁸⁴

The SJA to CMC stated his belief that these leadership issues resulted, in large part, from the anomalies in the current Departmental legal organization. The SJA to CMC pointed out that in the Army and Air Force, responsibilities, authorities, and accountability for the legal mission

⁷⁸³ MajGen Ary Authorities Letter, *supra* note 673, enclosure (1), at 1.

⁷⁸⁴ SJA to CMC *Submission*, *supra* note 38, at 52-55; see USMC *SAP*, *supra* note 42, at 11-13. The SJA to CMC noted that, within the Marine Corps, "a theory of *complete* de-centralization of legal services" has developed, in which the "commander's SJA office comprises a distinct 'independent' legal entity." SJA to CMC *Submission*, *supra* note 38, at 52-53. The SJA to CMC stated that this theory "results from the statutory authority of commanders to communicate directly with the SJA;" *id.* at 53, the default delegation of the JAG's Chapter 47 duties; the lack of any statutory leadership role for the SJA to CMC; and the Corps' operational and cultural preference for de-centralization of legal services." *Id.* The SJA to CMC also noted that, "To a large degree this is consistent with the service culture and operational doctrine of the Marine Corps which emphasizes the primacy of the commander in maintaining discipline and readiness, the commander's prerogative to task-organize resources based on mission requirements, independence of the staff judge advocate's office, mission-oriented orders, and de-centralized execution." *Id.* The SJA to CMC stated that while this model has served the Corps well for decades, "emergent operational demands, increased force size, and the complexity of military justice requirements . . ." have strained this model. *Id.*

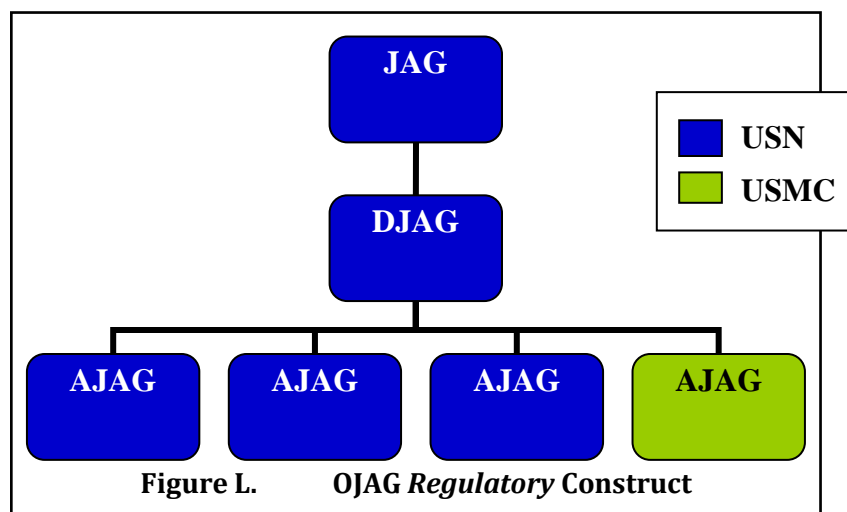
are clearly established by statute in a Service-level JAG. This construct recognizes that the uniformed legal mission is largely performed at the Service level, and accounts for the requirement in each Service for a uniformed legal leadership billet that is accountable for supervising the legal mission. In a single-Service Department, issues of balance and clarifying lines of authority within the uniformed legal community do not arise, whereas in a dual-Service department with different Service-level missions and legal organizations, unique challenges do arise. The SJA to CMC observed that the statutory construct for the JAG and OJAG intended to create a balanced Departmental legal organization, with each Service holding a fair share of departmental leadership billets, including the position of the JAG. As depicted by the SJA to CMC, the positions of JAG and DJAG would rotate from time to time between U.S. Navy judge advocates and Marine judge advocates, and there would be only two Assistant JAG positions – one filled by a U.S. Navy judge advocate and the other by a Marine judge advocate.



The preceding construct would ensure that the two Services were equal partners, fully integrated into, and oriented to, the Departmental mission. Departmental integration would necessarily include an equal Service voice in the formulation of Departmental policy, oversight, and budgetary decision on legal matters, as well as an equal voice in the formulation of legal advice provided to the Secretary of the Navy.

The SJA to CMC observed that the U.S. Navy, lacking a statutory Service-level billet, has been forced to use a regulatory construct to assign a U.S. Navy Service-specific role for the JAG and OJAG, in order to meet the challenges of operating an effective legal community in the U.S. Navy. The SJA to CMC pointed out that this regulatory role perpetuates a need for the U.S.

Navy to maintain control of the Departmental JAG and Deputy JAG billets, and an expanded number of AJAG billets. The SJA to CMC noted that this regulatory construct departs from the statutory construct, results in a lack of balance, creates leadership gaps within the Department’s uniform legal organization, and is ultimately an impediment to successful execution of the legal mission from the Department level. The SJA to CMC offered the following chart, which depicts OJAG as it stands today under regulatory instruments. Currently, as shown in Figure L, below, there are five positions filled by U.S. Navy judge advocates, and one filled by a Marine judge advocate.



The SJA to CMC also noted that, “Historically, the Marine legal services community has been much less formally organized and led than the JAG Corps of the other armed services.”⁷⁸⁵ To illustrate his point, the SJA to CMC referenced the Marine Corps’ *Legal Service Support Master Plan 1990-2000 (Plan)*, which provides that:

The [SJA to CMC] has no express statutory duties other than those which any staff judge advocate has under the UCMJ.

....

⁷⁸⁵ USMC SAP, *supra* note 42, at 11.

The [SJA to CMC] has no Departmental responsibilities whatsoever . . . he does not exercise any supervisory authority . . . [s]uch authority remains with the chain of command . . .⁷⁸⁶

The *Plan* further provides: “Staff Judge Advocates (SJAs), LSSS OICs, and senior judge advocates have exclusive cognizance throughout the Marine Corps over military law.”⁷⁸⁷

The SJA to CMC noted that this approach, while consistent with the Corps’ Service culture at the time, “failed to recognize a gap in service authority over the practice of law in the Marine Corps, and resulted in a wide range of disparate procedures for the delivery of legal services in our Corps.”⁷⁸⁸

The SJA to CMC stated his belief that these fundamental leadership issues have contributed to challenges in post-trial processing, and the delivery of legal services overall, including:

- lack of technical supervision, such as,
 - establishing uniform, Service-wide policies and procedures;
 - establishing uniform, Service-wide performance standards;
 - oversight and accountability, including inspections to standards and mechanisms for accountability; and
- lack of professional supervision.⁷⁸⁹

The SJA to CMC stated that these historical challenges were exacerbated by the increasing quantity and complexity of legal requirements, coupled with emergent legal requirements resulting from operations in OEF and OIF.⁷⁹⁰ The SJA to CMC believes that for the Marine legal services community to overcome these challenges, they need to enhance the professional practice of law through more effective professional and technical supervision. The

⁷⁸⁶ 1990 Master Plan, *supra* note 762, ¶ C04., annex C, at C-II to -III.

⁷⁸⁷ *Id.* at 3-5.

⁷⁸⁸ USMC SAP, *supra* note 42, at 13; *see also* SJA to CMC Submission, *supra* note 38, at 53.

⁷⁸⁹ *See* MajGen Ary Authorities Letter, *supra* note 673, enclosure (1); *see* SJA to CMC Submission, *supra* note 38, at 55-56.

⁷⁹⁰ SJA to CMC Submission, *supra* note 38, at 53.

latter suggestion includes establishing and inspecting to uniform, Service-wide performance standards.⁷⁹¹ The SJA to CMC warned that such uniform, Service-level solutions must maintain the strengths of a command-driven legal system, which relies on de-centralized execution and on judge advocates who are unrestricted officers, fully integrated into the Marine air-ground team.⁷⁹² The SJA to CMC believes that establishing and implementing such solutions requires a Service-level judge advocate leadership billet that has the necessary responsibility and authority.⁷⁹³ Such a billet would provide the consistent accountability that Congress contemplated in identifying the need to overcome the systemic challenges that led to cases like *U.S. v. Foster*.⁷⁹⁴

The SJA to CMC suggested that the Panel recommend amendments to title 10 of the U.S. Code to provide an independent statutory basis for clarifying and strengthening the role of the SJA to CMC, as opposed to relying only on a proposed Departmental regulation.

The SJA to CMC stated that proposed regulatory changes were insufficient and unlikely to have the lasting impact necessary to restore the intended statutory balance to the Department and meet the legal requirements of both Services. The SJA to CMC believes the historic U.S. Navy Service orientation and focus of the JAG and OJAG has diluted the Marine Corps' Service voice in the formulation of Service-level legal solutions, and in matters of Department-wide legal policy, oversight, and budgetary decisions. The SJA to CMC points out that this imbalance and U.S. Navy-centric paradigm evolved from a statutory framework intended to create balance.⁷⁹⁵ Therefore, he stated, one must ask whether any regulatory remedy can succeed where past statutory schemes failed. The SJA to CMC opined that a Departmental legal system built on collaboration and cooperation may work some of the time; however, lasting success depends on clearly defined and consistently interpreted leadership roles.⁷⁹⁶ The SJA to CMC pointed out that since the creation of the UCMJ in 1950, Congress has consistently found it preferable to codify roles and functions with respect to administration of military justice and to define the

⁷⁹¹ See MajGen Ary Authorities Letter, *supra* note 673, enclosure (1); see SJA to CMC Submission, *supra* note 38, at 56.

⁷⁹² MajGen Ary Authorities Letter, *supra* note 673, enclosure (1), at 2; SJA to CMC Submission, *supra* note 38, at 56.

⁷⁹³ MajGen Ary Authorities Letter, *supra* note 673, enclosure (1), at 2-3.

⁷⁹⁴ *Id.* enclosure (1), at 3.

⁷⁹⁵ MajGen Ary Testimony, *supra* note 242, at 391, 396.

⁷⁹⁶ *Id.* at 391-93.

roles and functions of the senior uniformed attorney positions in statute. The SJA to CMC also pointed out that, over the past seven years, Congress has taken legislative action to further define the role of the Air Force JAG, to elevate the grade of all of the JAGs and that of the SJA to CMC, and to add non-interference provisions with respect to each of these billets. Thus, the SJA to CMC concludes that Congress has demonstrated a consistent intent to clarify and strengthen the role of the law in each of the Services to meet an increasingly critical demand for quality legal advice and support.⁷⁹⁷

2. The JAG's Position

The JAG submitted a written statement to the Panel, in which he averred that he is “personally committed to enhancing the authority and prestige of the SJA to CMC within the Marine Corps consistent with the needs and culture of the Marine Corps.”⁷⁹⁸ More specifically, the JAG testified to the Panel that he supported strengthening the role of the SJA to CMC for the execution of the military justice function within the Marine Corps, the delivery of legal assistance services within the Marine Corps, and the professional and ethical supervision of Marine judge advocates.⁷⁹⁹ The JAG testified that he believed such changes were best accomplished by regulatory means and delegations of authority, because it minimized the risk of unintended consequences that can occur in the legislative process. Specifically, the JAG stated,

I believe that [the SJA to CMC] does need the authority to unify the Marine Corps legal community in a way that he does not have right now. I believe that he needs to be able to establish policies and procedures within the Marines Corps legal community in a way that he doesn't fully have right now, to include overseeing the execution of UCMJ responsibilities within the Marine Corps, as well as the delivery of legal assistance services, for example.

I believe that he needs to have a prominent role in the professional ethics and supervision of Marine Corps attorneys. I also believe that all of these changes can be required – can be accomplished through regulatory means which are within our control, and it's not that I'm opposed, per se, to statutory change, but I believe when you begin to look at some of the statutory changes – proposed statutory

⁷⁹⁷ MajGen Ary Authorities Letter, *supra* note 673, enclosure (1), at 3.

⁷⁹⁸ VADM Houck Memorandum (Ser 00/0098), *supra* note 172, at 7-8; *see also* VADM Houck Testimony, *supra* note 107, at 246 (testifying that “the SJA needs to be strengthened within the Marine Corps.”).

⁷⁹⁹ VADM Houck Testimony, *supra* note 107, at 247-48.

changes that are on the table, that they begin to create branches and offshoots of complexities and potential unintended consequences by doing it in a statutory way that are not present, I feel confident, if we do it in a regulatory way within the Department.⁸⁰⁰

The JAG testified further that he opposes any efforts to strengthen the position of the SJA to CMC at the expense of the authority of the Secretary of the Navy, or the role of the JAG as the leader of the Navy JAG Corps, or the ability of the JAG to provide legal advice and assistance to the CNO and the operating forces and shore establishment of the U.S. Navy. The JAG testified,

I do think the SJA needs to be strengthened within the Marine Corps. It's not clear to me through the years why the SJA has – as a matter of practice within the Marine Corps, in my estimation, has declined in influence. So I'm completely supportive of that proposition, but . . . I do believe we can do that and not do violence to some other important things: One, the Secretary of the Navy's authority, either structural or within the Secretary's discretion to administer and run the Department as the Secretary sees fit to do that. So I don't think we want to do violence to that. Number 2, I don't think we want to do violence to the Judge Advocate General's ability to lead and manage the Navy JAG Corps. And, thirdly, I don't think we want to do violence to the ability to give quality legal advice to the CNO, and that is a function not only of direct legal advice, but for all the fleet commanders, all the Navy-specific functions that take place.⁸⁰¹

The JAG asserted that he is as “equally committed to maintaining a well-integrated Navy-Marine Corps partnership at the Departmental level . . .” as he is to increasing the authority of the SJA to CMC.⁸⁰² Therefore, in his testimony, the JAG addressed some of concerns raised by the SJA to CMC regarding the imbalance of Navy and Marine Corps representation in OJAG and the positions of the JAG, Deputy JAG, and Assistant JAGs, noting that the balance can be shifted pursuant to discussion between the concerned parties.⁸⁰³ He described the current balance in the military justice structure as “pretty good.”⁸⁰⁴ He also clarified that the relatively low representation of Marine judge advocates in OJAG is “not the desire of the Navy JAG Corps. That is nothing that we imposed, and no policy of any Judge Advocate General to have

⁸⁰⁰ *Id.* at 248-49.

⁸⁰¹ *Id.* at 246-47.

⁸⁰² VADM Houck Memorandum (Ser 00/0098), *supra* note 172, at 8.

⁸⁰³ VADM Houck Testimony, *supra* note 107, at 441-44.

⁸⁰⁴ *Id.* at 441-42.

that kind of imbalance.”⁸⁰⁵ With respect to the fact that the Navy has three Assistant JAGs while the Marine Corps has one, the JAG testified that, “If the Marine Corps wanted to use the Marine Corps statute perhaps in a different way, or if we wanted to look at rebalancing who serves in some of these positions, we can always do that.”⁸⁰⁶

According to the JAG, “The partnership between the Navy JAG Corps and the Marine Corps legal community has been, and continues to be, essential to fulfilling the Department of the Navy’s legal mission.”⁸⁰⁷ The JAG detailed some of the JAG Corps’ contributions to that partnership, noting that “. . . the Navy JAG Corps has historically provided, and continues to provide, a significant share of legal support in Departmental billets[,]” including Navy-Marine Corps Trial Judiciary, Navy-Marine Corps Appellate Review Activity, OJAG, and Naval Justice School.⁸⁰⁸ He also noted that the U.S. Navy JAG Corps provides support to Marine Corps Service missions such as courts-martial, legal assistance, and augmentation of Marine Expeditionary Forces with U.S. Navy judge advocates for combat deployments.⁸⁰⁹ Rather than impairing the ability of the two services to integrate, “dual hatting” enables the JAG to ensure that the U.S. Navy JAG Corps functions as a cohesive, efficient team.

3. The CNO’s Position

By correspondence to the Panel dated October 21, 2010, the CNO noted that as the proposed regulatory changes were intended to strengthen military justice within the Marine Corps, he would defer to the Secretary on the manner in which changes were implemented.⁸¹⁰ However, he stated his desire to review specific proposals to ensure that delivery of legal services within the U.S. Navy would not be affected.

With regard to the perceived Departmental imbalance, the CNO wrote that having a Marine judge advocate serve as the JAG or Deputy JAG would change what the CNO regarded as a logical and efficient construct that had served the Department and the Navy extremely

⁸⁰⁵ *Id.* at 442.

⁸⁰⁶ *Id.* at 443.

⁸⁰⁷ VADM Houck Memorandum (Ser 00/0098), *supra* note 172, at 1.

⁸⁰⁸ *Id.* at 1-4.

⁸⁰⁹ *Id.* at 4-5.

⁸¹⁰ Chief of Naval Operations Memorandum, *Subj: Role and Authority of the Judge Advocate of the Navy*, 1 (Oct. 21, 2010).

well.⁸¹¹ Mindful of the potential impact of this issue on the Department and the U.S. Navy, the CNO made the following points and observations:

- within the Department, because the U.S. Navy held the preponderance of effort by measures such as force structure and bases, it makes sense for the JAG advising the Secretary to be a U.S. Navy judge advocate;
- having Navy officers serve as the JAG and Deputy JAG has not thrown the Department “‘out of balance’ from a legal perspective” as some have opined;
- U.S. Navy judge advocates have been vocal advocates of having all three legal organizations in the Department coordinate activities and improving coordination throughout the Department;
- the JAG already testified to the Panel that the JAG would welcome additional Marine Corps representation within OJAG;
- the Department does not measure effectiveness primarily by comparing the number of senior Navy officers to the number of senior Marine officers assigned, and if balance was the concern, the ratio of active-duty judge advocate flag or general officers to active-duty judge advocates is approximately 1 to 400 for both Services;
- the Department gained efficiencies from the Secretary of the Navy assigning the JAG additional duty as a Special Assistant to the CNO, and attempting to limit the JAG to a Department-only role would bring neither effectiveness nor efficiency to the Department;
- the U.S. Navy benefits from having the most senior officer in the JAG Corps also serve as the leader of the JAG Corps;
- the JAG leads a 2,300-strong Navy JAG legal community, and must have an intimate knowledge of the community and its personnel to properly exercise his statutory responsibility for the assignment of U.S. Navy judge advocates;
- familiarity in the U.S. Navy budgeting process and U.S. Navy personnel system was critical to securing resources needed by the JAG Corps;

⁸¹¹ *Id.*

- the existing BSO model permits the Deputy JAG to lead the Naval Legal Service Command, support the JAG in supporting both the Secretary and the CNO, and learn from the JAG how to manage the complexities associated with leading the community; and
- it has long been within the statutory authority of the Secretary of the Navy to limit the JAG's Navy Service-specific responsibilities, and to allow selection boards to consider Marine judge advocates for JAG and Deputy JAG (DJAG).⁸¹²

Based on the foregoing rationale, the CNO recommended that, with respect to whether Marine judge advocates should compete for the position of JAG, one should keep in mind “the fundamental issue of whether the Department as a whole will be better served.”⁸¹³

4. The Commandant’s Position

By correspondence dated October 29, 2010, the Commandant wrote that he considered the execution of uniformed legal functions to be an essential Service-level mission, as reflected in the Marine Corps' commitment to fielding a legal community of Marine judge advocates who share the Corps' unique ethos and culture. The Commandant wrote that a Marine officer responsible to the Commandant should supervise the Marine Corps legal community in accomplishing that mission, and that the SJA to CMC was the appropriate officer for that role and should be given the responsibility and authority necessary to carry out that function in the Marine Corps. The Commandant also stated that he believed that the SJA to CMC should advise the Secretary of the Navy directly on military justice matters that impact the Corps.

As to the means for accomplishing these goals, the Commandant noted that senior uniformed legal officers of the Marine Corps' sister Services are assigned duties by statute and, thus, statutory change to clarify the role, duties, and authority of the SJA to CMC appears appropriate.

The Commandant also wrote that as an equal partner in the Department of the Navy, the Marine Corps is committed to ensuring that the “Navy-Marine Corps team’ remains strong and

⁸¹² *Id.* at 1-3.

⁸¹³ *Id.* at 3.

relevant.”⁸¹⁴ Accordingly, the Commandant also wrote that he was deeply committed to ensuring that the Marine Corps would play a more consistent and institutionalized leadership role at the Departmental level. The Commandant wrote that he was strongly in favor of Marines competing for the JAG and DJAG positions and other Departmental leadership positions. Leaving aside the benefit that would likely accrue to the Marine Corps, the Commandant concluded that such competition could only make the Department a stronger and better-integrated team.

5. The Secretary of the Navy’s Position

On November 5, 2010, the Secretary of the Navy replied to the Panel and attached the Service perspectives of the CNO and the Commandant.⁸¹⁵ The Secretary wrote that he had concluded that both regulatory and legislative action was warranted to enhance efficiency, effectiveness, and accountability for the mission performed by the Department's uniformed legal officers. He also stated that he would take regulatory action immediately and propose legislation to ensure that the improvements endure and that the SJA to CMC reports to him in addition to continuing to support the Commandant. The Secretary of the Navy wrote that the revision to SECNAV Instruction 5430.27C would reflect assessments conducted by the DON and the DoD Inspector General's (IG's) draft report on post-trial processing.

The Secretary of the Navy further provided that he would propose legislation that would establish a direct relationship between the Secretary and the SJA to CMC and provide the SJA to CMC with the authority to supervise the administration of military justice and legal assistance in the Marine Corps. The legislation would enhance accountability by clarifying that the SJA to CMC is the uniformed officer within the Marine Corps responsible for those functions. The Secretary wrote that, importantly, the legislative proposals would not alter the Commandant's title 10 responsibilities with regard to assigning Marine judge advocates, and would permit the SJA to CMC to set and maintain standards for the provision of uniformed legal services in the Marine Corps, consistent with the JAG's existing title 10 authorities. The Secretary also wrote that Congressional enactment of the proposals would further institutionalize efforts to close gaps

⁸¹⁴ Gen Amos Letter of Oct. 29, 2010, *supra* note 673, at 1.

⁸¹⁵ Letter from the Honorable Ray Mabus, Secretary of the Navy, to Mr. Daniel J. Dell’Orto, Chairman, Independent Review Panel (Nov. 5, 2010).

in authority and accountability, particularly with respect to post-trial processing of courts-martial and management of the Marine judge advocate community.

6. DoD IG Report

Subsequent to receiving the testimony of the SJA to CMC and the JAG, and the correspondence from the Secretary of the Navy, the CNO, and the Commandant, the Panel received the final report of the DoD IG with respect to post-trial processing of courts-martial within the Department of the Navy. Among the recommendations made by the DoD IG, two (recommendations 5 and 9) directly apply to the Panel's charter. They are reprinted below.

5. We recommend the Secretary of the Navy, Commandant of the Marine Corps, and Judge Advocate General of the Navy take appropriate steps to authorize the Staff Judge Advocate to the Commandant of the Marine Corps to:

a. exercise professional supervision over Marine judge advocates and the legal services they deliver; and

b. conduct Article 6, Uniform Code of Military Justice inspections in the Marine Corps.⁸¹⁶

....

9. We recommend the Secretary of the Navy initiate a legislative proposal(s) to amend statute as appropriate to authorize the Staff Judge Advocate to the Commandant of the Marine Corps to certify a Marine judge advocate's competence to perform duties as trial or defense counsel.⁸¹⁷

With regard to recommendation 5 reprinted above, the DoD IG reported that the Department of the Navy concurred in the recommendation, stating:

(1) The Navy JAG and Marine Corps SJA, in coordination with the DON General Counsel, have been directed to revise SECNAVINST 5430.27C to increase Marine Corps SJA responsibility and authority to set and maintain standards for administering military justice and providing uniformed legal services in the Marine Corps. The revision will expressly delegate the Navy JAG's Article 6, UCMJ, inspection responsibilities within the Marine Corps to the Marine Corps SJA.

⁸¹⁶ DoD IG Report, *supra* note 377, at 60. Please note that recommendation 5 in the final report was recommendation 6 in the draft report to which DON submitted its responses. Thus, DON concurred in draft recommendation 6, which was reported as DON's concurrence in final recommendation 5.

⁸¹⁷ *Id.* at 62.

(2) Legislation will be proposed to establish a direct relationship between the Secretary of the Navy and the Marine Corps SJA to enhance oversight and accountability over the new Marine Corps SJA authority.

(3) A legislative change to 10 U.S.C. §806 will be proposed to make the Marine Corps SJA responsible and accountable for conducting Article 6, UCMJ, inspections in the Marine Corps.

(4) The changes all will be drafted to ensure consistency with the Navy JAG's Title 10 authorities.⁸¹⁸

The DoD IG found the DON comments to be responsive.⁸¹⁹

With regard to recommendation 9 (legislative proposal to authorize the SJA to CMC to certify Marine judge advocates' competence to perform duties as trial or defense counsel), the DoD IG reported that the DON responded as follows:

The DON agreed that a statutory change is needed to enhance and clarify the Marine Corps SJA's authority over delivery of professional legal services in the Marine Corps. However, the DON believes modifying 10 U.S.C. §§ 5041, 5046, 1044, and 806 (to be implemented through revisions to relevant DON and Marine Corps regulations) will best accomplish the needed change and make amendment of Article 27(b) unnecessary.⁸²⁰

The DoD IG found the DON comments to be responsive, and made the following additional comment:

Although we believe pursuing a direct amendment to Article 27(b), Uniform Code of Military Justice, should continue as an active option during this process, we have modified our original recommendation to eliminate mention of Article 27(b). This modification provides DON greater latitude in pursuing changes needed to enhance and clarify the Marine Corps SJA's authority.⁸²¹

In the "findings and analysis" section of its report, the DoD IG made the following observation about the need to clarify and strengthen the role and functions of the SJA to CMC:

Through statute and Secretary of the Navy instruction, the Navy JAG is responsible for military justice matters in the Marine Corps. In reality, however,

⁸¹⁸ *Id.* at 60.

⁸¹⁹ *Id.*

⁸²⁰ *Id.* at 62-63.

⁸²¹ *Id.* at 63.

neither the current nor previous Navy JAGs have generally exercised this responsibility vis à vis the Marine Corps, as evidenced by the longstanding post-trial delay problems. The operating paradigm has been to “trust” the Marine Corps to manage issues, in effect ceding responsibility without granting corresponding authority. Whether this situation resulted from respect for the Marine Corps’ autonomy, or was a default result from overall time consuming demands on the Navy JAG, it produced a leadership vacuum in the Marine Corps.⁸²²

The DoD IG also observed that:

The operations tempo and heavy demand for legal services in all disciplines has expanded the requirements for judge advocate functions in all Services. In this operational environment, the Navy JAG must rely on the Marine Corps SJA to exercise functional supervision and leadership in the Marine Corps judge advocate community, either on the Navy JAG’s behalf or under direct authority that must be created.⁸²³

⁸²² *Id.* at 54.

⁸²³ *Id.* at 55. In addition to the quotation cited above in the main text, the DoD IG made the following points:

The Marine Corps SJA does not have departmental responsibilities and supervises only those functions and personnel assigned to the Judge Advocate Division, Headquarters, Marine Corps. His role is advisory at the headquarters level, except as the Secretary of the Navy, the Navy JAG, or the Commandant of the Marine Corps may otherwise direct. From an overall perspective:

- Marine Corps field legal organizations do not have any supervisory legal organization monitoring their activities. They function totally autonomously.
- The Marine Corps SJA serves as the occupational field sponsor for judge advocates, legal services officers, and enlisted members, but does not have supervisory authority over these personnel. This authority remains within the non-JAG chain of command.
- The Navy JAG, by statute, holds exclusive authority to certify judge advocates as competent to perform duties as trial and defense counsel.
- The Marine Corps SJA is not authorized to conduct Article 6 inspections, or exercise professional supervision over legal services delivered in the Marine Corps.
- Not having field supervisory authority impacts the Marine Corps SJA's stature as the military legal community's leader in the Marine Corps. Recent legislation increasing the Marine Corps SJA’s grade to Major General suggests some intent for the position to have greater leadership and supervisory responsibilities.

Id. at 54-55.

With regard to the above points, it is worth noting that the SJA to CMC conducts inspections in the field in the Marine Corps by operation of longstanding agreement between the JAG and the Commandant of the Marine Corps as reflected in the *LEGADMINMAN*, which provides: “per agreement with JAG and CMC, the SJA to CMC conducts UCMJ, Article 6 visits to Marine Corps commands on behalf of [t]he JAG[.]” *LEGADMINMAN*, *supra* note 46, ¶ 22004., at 22-5, and as provided in SECNAVINST 5430.27C, which states: “The SJA to CMC conducts annual inspections to ensure that Marine Corps law centers are functioning properly and efficiently[.]” SECNAVINST 5430.27C, *supra* note 15, ¶ 8.f., at 6.

The administrative delegations of inspection authority encompassed in the JAG-Commandant agreement and the SECNAVINST do not, on their face, comprise a complete delegation of the full authority and responsibility entailed

The DoD IG also noted that,

In meetings, the Navy JAG, Vice Admiral James Houck, and the Marine Corps SJA, Major General Vaughn Ary, candidly assessed the post-trial delay problems triggering this review. In their words, there was a culture shift away from military justice to operational law, most significantly during Gulf War I and thereafter. They are implementing many initiatives to address outstanding issues, in addition to numerous initiatives dating to about 2005, which are now in force. As Major General Ary commented, they must set standards, train to standards, and inspect to standards.⁸²⁴

In summary, while the DoD IG found that the JAG must rely on the SJA to CMC to exercise supervision and leadership of the legal community within the Marine Corps, the DoD IG emphasized that the SJA to CMC lacks the necessary authority to effectively exercise such supervision and leadership. Thus, the DoD IG recommended that the SJA to CMC be granted such authority through both regulatory and legislative action.

7. Panel's Recommendations

The Panel recommends clarifying and strengthening the role of the SJA to CMC for supervision of the administration of military justice in the Marine Corps, for the delivery of legal assistance services within the Marine Corps, and for the professional and technical supervision of Marine judge advocates. Consistent with the Secretary of the Navy's response and the *DoD IG Report*, the Panel believes that establishing a direct relationship between the Secretary and the SJA to CMC, and providing the SJA to CMC with the authority and responsibility to supervise the administration of military justice and legal assistance in the Marine Corps is warranted.⁸²⁵ Further, the Panel believes that the SJA to CMC should be responsible for the professional and technical supervision⁸²⁶ of Marine judge advocates, consistent with the JAG's existing title 10

in Article 6 of the UCMJ. Specifically, Article 6, on its face, addresses the requirement for "frequent inspections in the field *in supervision of the administration of military justice.*" 10 U.S.C. § 806(a) (emphasis added). While the *LEGADMINMAN* and *SECNAVINST 5430.27C* reflect a partial delegation of authority, (i.e., the authority to inspect and visit), they do not, by their express terms, include a delegation of authority to supervise the administration of military justice.

⁸²⁴ DoD IG Report, *supra* note 377, at 56.

⁸²⁵ The Panel emphasizes that establishing a direct reporting relationship with the Secretary need not, and should not, alter the statutory position of the SJA to CMC as a member of Headquarters, Marine Corps. This positioning of the statutory billet benefits the supervision and execution of the Service-level legal mission, as well as the community health and career progression of Marine judge advocates.

⁸²⁶ It is important to distinguish "technical supervision" from other supervisory functions associated with "command authority" or "professional supervision." Command authority is exercised by a commander or officer-

authorities and the role of the General Counsel.⁸²⁷ The Panel believes that clarifying and strengthening the role of the SJA to CMC, as described, will improve the delivery of legal services within the Marine Corps, and in particular post-trial processing at the Service level, by institutionalizing clear lines of authority and accountability.

The Panel agrees with the dual regulatory and statutory approaches described by the Secretary of the Navy in his correspondence of November 5, 2010. The Panel agrees that legislation would provide the more enduring, institutional basis for clarifying and strengthening the role of the SJA to CMC. The Panel defers, however, to the Departments of the Navy and Defense as to which particular functions need to be statutory, regulatory or both. The Panel believes that those Departments are best able to make the technical judgments and compromises that would be essential in drafting such legislation and regulations.

Finally, the Panel notes that under sections 5148 and 5149 of title 10, the JAG is appointed from qualified judge advocates of the Navy or the Marine Corps and the Deputy JAG is appointed from qualified judge advocates of the Navy and the Marine Corps.⁸²⁸ The Panel does not take any position on whether there should be competition for the JAG or Deputy JAG positions among Navy Judge advocates and Marine judge advocates. The Panel notes that the Secretary of the Navy did not address the issue, nor did the Panel request that he take a position on the issue. Although the Panel has great respect for the strongly held positions of the CNO and the Commandant, in light of our statutory mandate, the Panel does not feel it is appropriate to take a position on this issue.

in-charge over those subordinates assigned to his command; it includes the authority to issue binding orders to perform specific duties and tasks, and enforce those orders through disciplinary and administrative action. Command authority follows the operational chain of command. Technical supervision, as the term is used by this Panel, does not include command or control over subordinates, and does not necessarily follow the operational chain of command. Rather, it consists of providing guidance and standards, of a technical nature, within a particular occupational field. For example, a Marine infantry division SJA may provide guidance directly to SJAs within subordinate infantry regiments. Technical supervision may only be binding in the sense that it establishes a standard of performance against which performance may be evaluated. Specific violations of technical guidance generally do not form the basis for disciplinary action under the UCMJ for non-compliance. However, non-conformity could form the basis for a commander to issue an adverse performance evaluation or to relieve a judge advocate of his duties, or it may provide cause for the JAG to revoke a judge advocate's 27(b) certification.

⁸²⁷ The Panel recognizes that the General Counsel is responsible for certain areas of practice in the Department, either exclusively or jointly, and that some Marine judge advocates are assigned to the Office of the General Counsel, principally in the Office of Counsel to the Commandant. The Panel is not proposing that any of these existing roles, authorities, or relationships be changed.

⁸²⁸ 10 U.S.C. §§ 5148-5149.

VII. Panel's Conclusions and Recommendations

This final section is intended to consolidate the Panel's conclusions and recommendations, made throughout the report. The presentation corresponds with duties assigned the Panel by section 506 of the *National Defense Authorization Act for Fiscal Year 2010*.

A. The Panel shall “carry out a study of the policies and management and organizational practices of the Navy and Marine Corps with respect to the responsibilities, assignment, and career development of judge advocates for purposes of determining the number of judge advocates required to fulfill the legal mission of the Department of the Navy.”

- The Department of the Navy (DON) requires approximately 950 active-duty U.S. Navy judge advocates and a target inventory of approximately 550 active-duty Marine judge advocates to fulfill the legal mission of the Department. The Marine Corps target inventory is based on a recommended minimum of 400 structured Service, Department, and Joint legal billets, a proportionate number of non-legal billets (B-Billets), and a sufficient number of P2T2 billets to ensure community health and proper career progression.
- The Marine Corps's bottom-up, top-down, requirements-driven manpower determinations, along with the studies directed by the Staff Judge Advocate to the Commandant of the Marine Corps (SJA to CMC), proved realistic and useful. The recent steps taken by the Marine Corps to increase both the number of structured judge advocate billets and its inventory of judge advocates on active duty are applauded. The Marine Corps' programmed target inventory of approximately 550 judge advocates over the next five years will be sufficient to fulfill the legal requirements of the Marine Corps, as well as to preserve the ability of Marine judge advocates to serve in non-legal billets, maintaining their role as well-rounded Marine Air-Ground Task Force (MAGTF) officers and contributing to the broader Marine Corps mission.
- The anticipated reduction in demand for Marine judge advocates task-organized to regiments and battalions in OEF and OIF, along with the addition of 32 billets to the Marine Corps' 4402 structure, should alleviate the associated strain on the Marine Corps' judge advocate force and the military justice mission.

- The recommended Marine Corps judge advocate requirement may be affected by: (1) a significant increase in the military justice mission once Marines redeploy from Afghanistan; (2) structured operational law requirements continuing to increase at or near the same rate as has been experienced since September 11, 2001; (3) the SJA to CMC being provided additional authority to supervise Marine judge advocates and the delivery of legal services; or (4) a significant reduction in Marine Corps total officer and enlisted end-strength.
- In contrast to the Marine Corps – which is implementing a process of structured growth within its judge advocate community – the U.S. Navy is planning to reduce its judge advocate community. The U.S. Navy finished Fiscal Year 2010 (FY 10) with 811 active-duty judge advocates, and programmed a reduction in authorized end-strength from 801 in FY 11 to 747 in FY 16.
- The Judge Advocate General of the Navy (JAG) provided a command-by-command analysis of existing Navy judge advocate requirements and found that 926 U.S. Navy judge advocates are required to meet requirements today. The JAG’s assessment is an accurate description of the requirements today; however, it did not address likely future requirements including: additional Individual Augmentation (IA) growth, additional requirements if the DON decides to affirmatively provide counsel at the earliest stages of the Disability Evaluation System, additional manpower requirements that will arise if the U.S. Navy establishes an independent Trial Defense Command, and a continued increase in permanent operational law requirements at current rates. Thus, while the JAG’s assessment of 926 judge advocates is an accurate description of the requirements today, the requirements over the next five years will be larger than 926. The Panel concludes that the JAG’s assessment will have to be adjusted upward to approximately 950 judge advocates by 2015.
- Given the existing budgetary programming authorizations for the Navy JAG Corps over the next five years, there will be a significant shortage of active-duty judge advocates in the U.S. Navy by 2015. The current shortage poses a significant level of legal risk to the DON and the Joint force, and a significant level of professional risk to the Navy JAG Corps. The DON and the U.S. Navy should act to mitigate these risks.

B. The Panel shall “review the emergent operational law requirements of the Navy and Marine Corps, including requirements for judge advocates on joint task forces, in support of rule of law objectives in Iraq and Afghanistan, and in operational units;”

- The demand signal for judge advocates with expertise in operational law will continue to grow at least at the same rate as it has since September 11, 2001, despite the current and anticipated redeployment of forces from Iraq and Afghanistan. This means that the permanent operational law billets can be expected to approximately double over the next decade for the Navy and Marine Corps, and there will likely be continued growth in the demand signal for judge advocates in contingency operations.
 - Judge advocates who fill operational law billets will require levels of education, training, and experience commensurate with the increasingly complex and intense legal and policy environment in which they and their commanders will operate.
- As operational law requirements continue to grow, particularly within Joint commands, it will become increasingly important for U.S. Navy and Marine judge advocates to serve in those commands, including in senior billets. Both Services should ensure that their judge advocates receive Joint Professional Military Education (JPME), and that there are deliberate and robust manpower processes in place to nominate highly qualified judge advocates for service in Joint billets.
 - Marines do not currently hold any senior, Joint SJA positions, and historically Marines have held a disproportionately small number of these positions. Service in senior legal positions within the Joint community provides individual senior Marine judge advocates important career enhancing experience, provides the Marine Corps the benefit of O-6 (colonel) judge advocates with senior-level Joint experience, and provides the Joint community the Service perspective of the Marine Corps legal community. The Marine Corps should consider measures to expand opportunities for senior Marine judge advocates to compete for senior legal positions within the Joint community.
 - Judge advocates are waived from the Joint Specialty Officer provisions of the *Goldwater-Nichols Department of Defense Reorganization Act of 1986*; consequently, the U.S. Navy does not consider JPME a requirement for U.S. Navy

judge advocates. Conversely, Marine judge advocates are required to complete JPME as part of their general PME requirement. The U.S. Navy should develop and fund a requirement for its judge advocates to receive JPME.

- The Department of Defense should develop options for formalizing judge advocate participation in the joint officer management program and joint qualification system.

C. The Panel shall “review new requirements to support the Office of Military Commissions and to support the disability evaluation system for members of the Armed Forces;”

- Manning requirements to support the Office of Military Commissions (OMC) are accounted for through December 2012. If support is required past that date, then the Deputy Secretary of Defense should extend the manning requirement.
- If a majority of the pending 34 cases are referred to military commissions, then the OMC will request that more experienced and accomplished litigators be assigned, and Navy and Marine Corps leadership will need to balance Service needs with the needs of the OMC.
- The existence of the OMC and the prospect for future military commissions underscores the need to develop and retain experienced, expert litigators in the U.S. Navy and Marine Corps judge advocate communities.
- The DON has taken satisfactory steps to fulfill new training and manning requirements related to legal representation of Wounded, Ill, or Injured (WII) service members in the Disability Evaluation System.
- An anticipated increase in the number of Formal Physical Evaluation Boards (FPEB) will result in a requirement for one more attorney to represent members before the FPEB.
- The Marine Corps and Army are affirmatively exercising the discretion to provide legal counsel to WII service members prior to the decision of the Informal Physical Evaluation Board, while the Navy and Air Force are not. The Panel recommends that this difference be examined by the Department of Defense and DON for the purpose of considering the balance of interests in providing early representation and to consider the implications of having the Services provide different levels of legal support to these service members.

D. The Panel shall “review the judge advocate requirements of the Department of the Navy for the military justice mission, including assignment policies, training and education, increasing complexity of court-martial litigation, and the performance of the Navy and Marine Corps in providing legally sufficient post-trial processing of cases in general courts-martial and special courts-martial;”

- Military justice is a primary statutory mission of U.S. Navy and Marine Corps judge advocates.
- While, over the past 10 years, there has been a significant decline in the total number of general and special courts-martial within the DON, the number of disciplinary cases initiated in the DON has remained relatively constant; cases resolved at forums other than courts-martial still require the services of judge advocates.
- The majority of the decline in the courts-martial caseload is attributable to a reduction in the number of special courts-martial. The general courts-martial caseload, generally the forum for more serious, complex, and high-profile offenses, has declined more slowly and appears to have stabilized since FY 06.
- Maintaining a cadre of experienced personnel is increasingly difficult where there are fewer, less complex special courts-martial involving less serious misconduct, and fewer cases overall, on which judge advocates may gain experience and maintain their perishable litigation skills. Both Services must have sufficiently trained and experienced litigators, supervisory attorneys, and judges to handle increasingly complex cases.
- DON post-trial processing has steadily improved since 2006. With the exception of *U.S. v. Foster* in February 2009, no DON case docketed on appeal after (and thus controlled by) *U.S. v. Moreno* (June 2006) was granted appellate court relief for a due process violation resulting from post-trial delay.
- With regard to the military justice mission, the judge advocate requirement is not necessarily just about numbers; more accurately, engaged leadership and effective oversight are the keys to ensuring continued accomplishment of the DON’s military justice mission.
- The three initiatives aimed at improving the DON military justice process and most responsive to ensuring engaged leadership and effective oversight are: implementation of

a single court-martial case tracking system; requiring an annual report on the state of military justice to the Secretary of the Navy, the Chief of Naval Operations, and the Commandant of the Marine Corps (the Commandant); and, continuing the Military Justice Oversight Council (MJOC). Both the annual report requirement and the MJOC should be institutionalized in a Secretary of the Navy Instruction.

E. The Panel shall “review the role of the Judge Advocate General of the Navy, as the senior uniformed legal officer of the Department of the Navy, to determine whether additional authority for the Judge Advocate General over manpower policies and assignments of judge advocates in the Navy and Marine Corps is warranted;”

- The Panel determined that, under its authority to review, evaluate, and assess such other matters and materials as the Panel considers appropriate for the purposes of this report, it should more broadly consider the role and responsibility of the JAG and the SJA to CMC.
- In general, unlike the Army and Air Force Judge Advocates General that are by statute part of their Service staffs and report directly to their Service chiefs, the Navy JAG is, by statute, part of the Office of the Secretary and reports directly to, and performs assigned duties under the direction of, the Secretary of the Navy. The JAG has both Department of the Navy and U.S. Navy roles and responsibilities. The JAG is part of the Office of the Chief of Naval Operations by regulation, not statute, and is also not part of Headquarters, Marine Corps. The JAG is Chief of the U.S. Navy JAG Corps by regulation, and makes all assignments of U.S. Navy judge advocates by statute. The Commandant makes all assignments of Marine judge advocates. The JAG, by statute, provides independent legal advice to the Secretary of the Navy and to the Chief of Naval Operations, but not to the Commandant.
 - Under both Secretarial and Chief of Naval Operations instruction, the JAG is a “capability sponsor” with the responsibility for “building a coherent legal community.” However, the JAG has no specific authorities assigned within the U.S. Navy’s manpower management system to fulfill this responsibility. The Secretary of the Navy and the Chief of Naval Operations, in coordination with the JAG, should

- identify and assign the authorities necessary to execute the responsibility to build a coherent legal community.
- The JAG has all the authority necessary under Article 6 of the Uniform Code of Military Justice with regard to assignment of Navy judge advocates.
 - To the extent the JAG's Departmental responsibilities require oversight of manpower policies and assignments of Marine judge advocates, he can adequately exercise that role with his current title 10 and regulatory authorities. Additional authority is not necessary or warranted. The Commandant, with the assistance of the SJA to CMC, is effectively managing judge advocate manpower (i.e., structure, inventory, and assignments) to meet Service, Departmental, and Joint legal requirements; and to ensure community health (i.e., recruiting, retention, and education) and proper career progression (i.e., promotions) for Marine judge advocates. Moreover, the JAG is not in the best position to exercise additional authority in these areas within the Marine Corps, given the Marine Corps' unique requirements for community health and career progression of Marine judge advocates. Lastly, transferring authority from the Commandant to the JAG could marginalize the SJA to CMC as a legal voice within his Service, contrary to the Panel's view that the role of the SJA to CMC needs to be clarified and strengthened.
 - The existence of four Assistant Judge Advocate General (AJAG) positions - AJAG (Civil Law), AJAG (Operations and Management), AJAG (Military Justice) and AJAG (Chief Judge) - are vitally important to the DON's uniformed legal community and are flag/general officer equivalent positions, with duties and responsibilities commensurate with those grades. The DON should consider adopting the current rotational process to support two Marine judge advocates and two U.S. Navy judge advocates for these regulatory AJAG positions, vice the current mix of three U.S. Navy judge advocates and one Marine judge advocate.
 - Similar to the statutory positions of the Judge Advocates General of the Army and Air Force, the SJA to CMC, by statute, is part of Headquarters, Marine Corps and reports directly to the Commandant. However, the SJA to CMC is not expressly assigned any other function by statute other than to provide independent legal advice to the

Commandant. The SJA to CMC has no statutory role with respect to supervision, manpower policies, or assignment of Marine judge advocates. The Secretary of the Navy has assigned certain Service-level duties through Secretarial regulation; however, these regulations do not expressly assign the SJA to CMC any supervisory role over the Marine judge advocate community as a whole.

- The SJA to CMC is appointed by the President and holds the grade of major general “while so serving” as the SJA to CMC. This “while so serving” construct is inconsistent with the general statutory framework for promotion to major general within the Department of Defense. Generally, for promotions to major general, an officer selected by a board, nominated, and then confirmed is promoted to the permanent grade of major general. Legislation to amend section 5046 of title 10 to allow for the permanent appointment of the SJA to CMC to the grade of major general should be considered.
- The Marine Corps has an effective manpower management system that identifies legal requirements, then funds and builds an active-duty inventory to support those requirements. This system effectively integrates the SJA to CMC as the Occupational Field Manager and Functional Advocate for Marine judge advocates. This system also effectively assigns judge advocates to properly established Service, Department, and Joint legal requirements, and to a proportionate share of B-Billets, to ensure proper career development and to meet the broader mission requirements of the Marine Corps. No additional authority for the SJA to CMC over manpower policies and assignment of Marine judge advocates is warranted.
- Consistent with the Secretary of the Navy’s position and the Department of Defense Inspector General’s Report, establishing a direct relationship between the Secretary of the Navy and the SJA to CMC, and providing the SJA to CMC with the authority and responsibility to supervise the administration of military justice and legal assistance in the Marine Corps, is warranted. Further, the SJA to CMC should be responsible for the professional and technical supervision of Marine judge advocates, consistent with the JAG’s existing title 10 authorities and the role of the General Counsel. Strengthening the role of the SJA to CMC, as described, will improve the delivery of

legal services within the Marine Corps, and, in particular, post-trial processing at the Service-level, by institutionalizing clear lines of authority and accountability.

- The dual regulatory and statutory approach described by the Secretary of the Navy is appropriate. Legislation would provide the more enduring, institutional basis for strengthening the role of the SJA to CMC. However, the Panel defers to the Departments of the Navy and Defense as to which particular functions need to be statutory, regulatory, or both. Those Departments are best able to make the technical judgments and compromises that would be essential in drafting such legislation and regulations.

F. The Panel shall “review directives issued by the Navy and the Marine Corps pertaining to jointly-shared missions requiring legal support;”

- Appropriate common directives, guidance, and training exist, allowing U.S. Navy and Marine judge advocates to work together in support of the DON.

G. The Panel shall “review career patterns for Marine Corps judge advocates in order to identify and validate assignments to nonlegal billets required for professional development and promotion;”

- Marine judge advocate inventory is built to account for the assignment of Marine judge advocates to non-legal billets, and Marine judge advocates have competed, and continue to compete, favorably on selection boards for promotion, resident schools, and command.
- Within the Marine Corps, having Marine judge advocates serve as unrestricted line officers, expected to maintain themselves as well-rounded MAGTF officers, makes for not only a better Marine officer, but also a more effective Marine judge advocate.

H. The Panel shall “review, evaluate, and assess such other matters and materials as the panel considers appropriate for purposes of the study.”

- The quality, or health, of the Navy and Marine judge advocate communities is strong and rests on three pillars: recruiting, retention, and professional education and training.
- Key factors in maintaining strong judge advocate communities are the continued focus on recruiting; support for the Navy’s Judge Advocate Continuation Pay program and the

Marine Corps' Law School Education Debt Subsidy program; and continued support for post-graduate school education.

I. “In carrying out the study . . . the panel may review, and incorporate as appropriate, the findings of applicable ongoing and completed studies in future manpower requirements, including the two-part study by CNA Analysis and Solutions entitled: ‘An Analysis of Navy JAG Corps Future Manpower Requirements.’”

- Even at the most stressful workload level considered by the Center for Naval Analyses (CNA) in its 2007 study of U.S. Navy judge advocate requirements, the 50-hour workweek, the U.S. Navy required a significant increase in judge advocate manning, particularly within the area of operational law. The study was a valuable and good faith effort at quantifying workload. However, the data in the study is now over three years old, the prediction about the military justice caseload has proven inaccurate, and CNA was not asked to consider more nuanced approaches. Consequently, while informed by the *CNA Study*, the JAG's manpower estimate is more current and nuanced.
- A review of internal Marine Corps studies, as well as a CNA study of Marine Corps manpower systems, reflects favorably on the Marine Corps' efforts to actively manage legal requirements, including: its use of a “bottom-up” structure review, careful assessment of increasing demands from operations and force growth, effective incorporation of the SJA to CMC as the Occupational Field Manager into the manpower process, and building active-duty judge advocate inventory in support of approved structure increases.

References

The attached DVD contains references for this report.

Abbreviations and Acronyms

A

ABA

American Bar Association

AC

Active Component

ACE

Air Combat Element

ADP LAW

Advance Degree Program - Law

AFRICOM

United States African Command

AIRS

Automatic Inspection Reporting System

AJAG

Assistant Judge Advocate General

ALMAR

All Marine Message

ALNAV

All Navy Message

AMOS

Additional Military Occupational Specialty

ARR

Arrestment

ASR

Authorized Strength Report

B

BA

Billets Authorized

BCR

Billet Change Request

BGen

Brigadier General

BLC

Basic Lawyer Course

BMOS

Billet Military Occupational Specialty

Bn

Battalion

BOLT

Basic Operational Legal Training

BSO

Budget Submitting Office

BUPERS

U.S. Navy Bureau of Naval Personnel

C

CA

Convening Authority

CAA

Convening Authority's Action

CAAF

Court of Appeals for the Armed Forces

CAPT

Captain

CAR

Capabilities Assessment Review

CCC-I

Central Criminal Court of Iraq

CDC

Chief Defense Counsel

CDP

College Degree Program

CG

Commanding General

CGIP

Commanding General's Inspection Program

CJCS

Chairman of the Joint Chiefs of Staff

CJCSI

Chairman of the Joint Chiefs of Staff Instruction

CJDON

Chief Judge, Department of the Navy

CLAMO

Center for Law and Military Operations

CLS

Career Level School

CMC

Commandant of the Marine Corps

CMS

Case Management System

CMTIS

Court-Martial Tracking and Information System

CNA

Center for Naval Analyses

CNO

Chief of Naval Operations

CO

Commanding Officer

COA

Central Operating Activity

COCOM
Combatant Command

COIN
Counterinsurgency

Col
Colonel

COMDTINST
Commandant Instruction

COMNAVLEGSVCCOMINST
Commander, Naval Legal Services Command Instruction

COP
Communities of Practice

CR
Court Reporter

CSC
Command and Staff College

D

DC CD&I
Deputy Commandant for Combat Development and Integration

DC M&RA
Deputy Commandant for Manpower and Reserve Affairs

DC
Defense Counsel

DCAP
Defense Counsel Assistance Program

DES
Disability Evaluation System

DoD
Department of Defense

DoDI
Department of Defense Instruction

DoD IG

Department of Defense Inspector General

DON

Department of the Navy

DON/AA

Department of the Navy, Assistant for Administration

DONCJIS

Department of the Navy Criminal Justice Information System

DOPMA

Defense Officer Personnel Management Act

DOTMLPF

Doctrine, Organization, Training, Materiel, Leadership and Education, Personnel and Facilities

DSJA

Deputy Staff Judge Advocate

DTM

Directive Type Memorandum

E

EFDS

Expeditionary Force Development System

ELP

Excess Leave Program

e-ROT

Electronic Record of Trial

EUCOM

U.S. European Command

F

FLEP

Funded Law Education Program

FMOS

Free Military Occupational Specialty

FOIA

Freedom of Information Act

FPEB

Formal Physical Evaluation Board

FSA

Field Support Activity

FSRG

Force Structure Review Group

FSSG

Force Service Support Group

FTS

Full-Time Support

FWD

Forward

FY

Fiscal Year

FYDP

Future Years Defense Program

G

GAR

Grade Adjusted Recapitulation

GCE

Ground Combat Element

GCM

General Court-Martial

GEN

General (U.S. Army)

Gen

General (U.S. Marine Corps)

I

IA

Individual Augmentation

Individual Augmentee

IDES

Integrated Disability Evaluation System

IG

Inspector General

ILS

Intermediate Level School

IO

Investigating Officer

IPEB

Informal Physical Evaluation Board

IRR

Inactive Ready Reserve

IST

Interservice Transfer

J

JACP

Judge Advocate Continuation Pay

JAD

Judge Advocate Division

JAG

Judge Advocate General of the Navy

JAGC

Judge Advocate General's Corps

JAGINST

Judge Advocate General Instruction

JAGMAN

Manual of the Judge Advocate General

JAI

Judge Advocate Division, Information, Plans, and Programs Branch

JAL

Judge Advocate Division, Legal Assistance Branch

JAM

Judge Advocate Division, Military Justice Branch

JAO

Judge Advocate Division, International and Operational Law Branch

JAR

Judge Advocate Division, Research and Civil Law

JAS

Judge Advocate Division, Support Branch

JCS

Joint Chiefs of Staff

JMD

Joint Manning Document

JOMO

Joint Officer Management Office

JPME

Joint Professional Military Education

JSO

Joint Specialty Officer

JTF

Joint Task Force

JTF-HOA

Joint Task Force – Horn of Africa

L

LCE

Logistics Combat Element

LEGADMINMAN

Marine Corps Manual for Legal Administration

LEP

Law Education Program

LL.M.

Legum Magister (Master of Laws degree)

LOAC

Law of Armed Conflict

LOD

Line of Duty

LSAT

Law School Admission Test

LSEDS

Law School Education Debt Subsidy

LSSS

Legal Service Support Section

LSST

Legal Service Support Team

LtCol

Lieutenant Colonel

LtGen

Lieutenant General

M

M&RA

Manpower and Reserve Affairs

M&RA (MM)

Manpower and Reserve Affairs (Manpower Management)

M&RA (MP)

Manpower and Reserve Affairs (Manpower Plans)

MAGTF

Marine Air-Ground Task Force

MajGen

Major General

MANMED

Manual of the Medical Department

MARADMIN
Marine Administrative Message

MarDiv
Marine Division

MARFOR
Marine Forces

MARFORRES
Marine Forces Reserve

MAW
Marine Air Wing

MCAGCC
Marine Corps Air Ground Combat Center

MCCLL
Marine Corps Center for Lessons Learned

MCDP
Marine Corps Doctrinal Publication

MCM
Manual for Courts-Martial

MCO
Marine Corps Order

MCRC
Marine Corps Recruiting Command

MCRCO
Marine Corps Recruiting Command Order

MEB
Marine Expeditionary Brigade
Medical Evaluation Board

MEB-A
Marine Expeditionary Brigade – Afghanistan

MEF
Marine Expeditionary Forces

MET

Mission Essential Tasks

MEU

Marine Expeditionary Unit

MFT

Mission, Function and Task

MJ

Military Judge

MJLCT

Military Justice Litigation Career Track

MJOC

Military Justice Oversight Council

MLG

Marine Logistics Group

MM

Manpower Management

MMPR

Manpower Management Promotion Branch, Manpower and Reserve Affairs

MNC-I

Multi-National Corps - Iraq

MNF-I

Multi-National Force - Iraq

MNF-W

Multi-National Force - West

MOC

Maritime Operations Center

MOS

Military Occupational Specialty

MP

Manpower Plans

MROC

Marine Requirements Oversight Council

MSC

Major Subordinate Command

Military Service Coordinator

MTF

Medical Treatment Facility

N

NAMARA

Navy-Marine Corps Appellate Review Activity

NAVADMIN

Navy Administrative Message

NAVREGS

Navy Regulations

NCIS

Naval Criminal Investigative Service

NDAA

National Defense Authorization Act

NITA

National Institute for Trial Advocacy

NJP

Nonjudicial Punishment

NJS

Naval Justice School

NLSC

Naval Legal Service Command

NLSO

Navy Legal Service Office

NLSO NC

Navy Legal Service Office North Central

NMCCA

Navy-Marine Corps Court of Criminal Appeals

NMCTJ

Navy-Marine Corps Trial Judiciary

NMOS

Necessary Military Occupational Specialty

NWP

Naval Warfare Publication

O

OCC

Officer Candidates Course

OccFld

Occupational Field

OCM

Officer Community Management

OCS

Officer Candidates School

OEF

Operation Enduring Freedom

OGC

Office of the General Counsel

OIC

Officer In Charge

OIF

Operation Iraqi Freedom

OJAG

Office of the Judge Advocate General

OMC

Office of Military Commissions

OP

Operational

OPA

Officer Programmed Authorizations

OPNAV

Office of the Chief of Naval Operations

OPNAVINST

Office of the Chief of Naval Operations Instruction

OPNAVNOTE

Office of the Chief of Naval Operations Notice

OPR

Office of Primary Responsibility

ORB

Officer Retention Board

OSD

Office of the Secretary of Defense

OSO

Officer Selection Officers

P

P2T2

Patient, Prisoner, Trainee, or Transient

PCS

Permanent Change of Station

PDE

Physical Disability Evaluation

PDLT

Pre-Deployment Legal Training

PEB

Physical Evaluation Board

PEBLO

Physical Evaluation Board Liaison Officer

PFR

Petition for Relief

PLC

Platoon Leaders Course

PLC (Law)

Platoon Leader's Course-Law

PMAS

Programmed Manpower Authorizations System

PME

Professional Military Education

PMOS

Primary Military Occupational Specialty

POM

Program Objectives Memorandum

PPBES

Planning, Programming, Budgeting, and Execution System

Q

QDR

Quadrennial Defense Review

R

RAD

Return to Active Duty

RADM

Rear Admiral (upper half)

RC

Reserve Component

RCM

Rule for Courts-Martial

RCT

Regimental Combat Team

RDC

Regional Defense Counsel

RFF

Request for Forces

RFI

Request For Information

RLS

Request for Legal Services

RLSO

Region Legal Service Office

RLSSS

Reserve Legal Service Support Section

RO

Review Officer

ROE

Rules of Engagement

ROT

Record of Trial

S

SAP

Strategic Action Plan

SASC

Senate Armed Services Committee

SASO

Security and Stability Operations

SCM

Summary Court-Martial

SECNAV

Secretary of the Navy

SECNAVINST

Secretary of the Navy Instruction

SEP LAW

Special Educational Program - Law

SES

Senior Executive Service

SJA
Staff Judge Advocate

SJAR
Staff Judge Advocate Review

SJA to CMC
Staff Judge Advocate to the Commandant of the Marine Corps

SLRP
Student Loan Repayment Program

SME
Subject Matter Expert

SMR
Statement of Manpower Requirements

SN
Strategic National

SPCM
Special Courts-Martial

SPMAGTF
Special Marine Air-Ground Task Force

SPP
Strategic Planning Panel

ST
Strategic Theater

T

T/O
Table of Organization

T/O&E
Table of Organization and Equipment

TA
Tactical

TBS
The Basic School

TC
Trial Counsel

TCAP
Trial Counsel Assistance Program

TDC
Trial Defense Command

TECOM
Training and Education Command

TF
Task Force

TFMMS
Total Force Manpower Management System

TFSD
Total Force Structure Division

TJAG
The Judge Advocate General

TJAGLCS
The Judge Advocate General Legal Center and School

TLS
Top Level School

TOECR
Table of Organization and Equipment Change Request

TOS
Time On Station

TTECG
Tactical Training Exercise Control Group

U

UCMJ
Uniform Code of Military Justice

UJTL
Universal Joint Task List

URB

Uncompensated Review Board

USA

U.S. Army

USAF

U.S. Air Force

USCENTCOM

U.S. Central Command

USCG

U.S. Coast Guard

USG

U.S. Government

USMC

U.S. Marine Corps

USN

U.S. Navy

V

VA

Department of Veterans Affairs

VADM

Vice Admiral

VASRD

Veteran's Administration Schedule for Rating Disabilities

VWAP

Victim Witness Assistance Program

W

WHS

Washington Headquarters Service

WII

Wounded, Ill, or Injured